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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 47

ERIE RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

STATEMENT AS TO JURISDICTION

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ERIE RAILROAD COMPANY,

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Appellees.

On Appeal from the United States District Court for the District of New Jersey

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Statement as to Jurisdiction

Appellant* Erie appeals from the final decree of the

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* Throughout this Statement as to Jurisdiction we will refer to Erie Railroad Company as "Erie"; New York Susquehanna & Western Railroad Company as "Susquehanna"; United States of America as "United States"; Interstate Commerce Commission as "Commission"; State of New Jersey as "State"; Board of Public Utility Commissioners of New Jersey as "Board"; Brotherhood of Locomotive Engineers as "Brotherhood"; United States Court for the District of New Jersey as "District Court"; Trustee for New Jersey and New York Railroad Company as "Trustee"; Delaware, Lackawanna & Western Railroad Company as "Lackawanna" and New York Central Railroad Company as "Central".

District Court entered on December 31, 1957 setting aside an order and certificate of public convenience and necessity issued by Commission on June 26, 1957. Erie submits this statement in compliance with Rule 13 of the Revised Rules of the Supreme Court of the United States to show the basis upon which the Supreme Court has jurisdiction on appeal to review said judgment of the District Court and that the questions presented are substantial.

Opinions Below

The opinion of the District Court in the above entitled matter is reported in 158 Fed. Sup. 104. The Final Decree in that case is annexed hereto as Appendix F. In its opinion District Court referred to its findings and determination in a companion case relating to the proposed abandonment by Central of its ferries between Weehawken, New Jersey and New York City, New York. The latter opinion is reported. *Board of Public Utility Comm. of N. J.* v. *United States*, 158 Fed. Sup. 98 (hereinafter referred to as "Central opinion"). The opinion of Commission is reported 295 I. C. C. 549. The opinion of the Commission on the motion of State and Board for reconsideration and rehearing is reported 295 I.C.C. 599 (copies of said opinions are annexed hereto as appendices A, B, C and D, respectively).

Jurisdiction

This suit was brought under 28 U. S. C. Sections 1336, 1398, 2284. 2321-2325 and 5 U. S. C. Section 1009 by State and Board to set aside an order and certificate of Commission authorizing Erie to abandon its passenger ferry line across the Hudson River between Jersey City, New Jersey and Chambers Street, New York City, New York and authorizing abandonment of use under contract of said ferry by Susquehanna and Trustee. The final decree of the District Court annuling the Commission's order and

certificate was date December 30, 1957, and entered on December 31, 1957. The notice of appeal was filed in that Court on February 18, 1958. The jurisdiction of the Supreme Court to review this decree by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). There are many decisions which sustain the jurisdiction of the Supreme Court to review the decree by direct appeal in this case. Two of them are *Alleghany Corporation et al* v. *Breswick & Co., et al*, 353 U. S. 151, 1 L. Ed. 2d 726, 77 S. C. 763 (1957) and *Morey* v. *Doud*, 354 U. S. 457, 1 L. Ed. 1485, 77 S. C. 1344 (1957).

Questions Presented

1. Whether Erie's proposed complete discontinuance of operation of its passenger ferry line across the Hudson River between its ferry terminal in Jersey City, New Jersey and its ferry terminal in New York City, New York is an abandonment of a portion of a line of railroad which the Commission had jurisdiction to authorize under Section 1(3)(a) and Sections 1(18-20) of the Interstate Commerce Act (49 U. S. C. Sections 1(3)(a) and (18-20)).

2. Whether Commission had jurisdiction and authority under Section 1(3)(a) and Section 1(18-20) of the Interstate Commerce Act to issue its certificate dated June 26, 1957 (in its Finance Docket Nos. 19,247, 19,351 and 19,374) that public convenience and necessity permitted abandonment by Erie of its said ferry line and abandonment of use under contract of said ferry line by Susquenhanna and Trustee.

3. If Commission had jurisdiction to issue said certificate, whether the evidence in the record before Commission is sufficient to sustain its certificate and the finding of public convenience and necessity contained therein.

Statutes Involved

The Statute primarily involved is Section 1(18) of the Interstate Commerce Act which provides that:

> "* * * no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

Section 1(3)(a) of the Interstate Commerce Act (49 U. S. C. 1(3)(a)) defines the term "railroad" to include "ferries used by or operated in connection with any railroad."

The relevant portion of Section 1(3)(a) of the Interstate Commerce Act and the provisions of Sections 1(18-20) and (22) of said Act are set forth in appendix E hereto.

Statement

Erie, a New York corporation, engaged in operating an interstate railroad, operates, in connection with said railroad, an interstate railroad ferry line for passengers and vehicles, across Hudson River between Jersey City, New Jersey and Chambers Street, New York City, New York. Erie also transports freight across Hudson River by car float and lighter.

The Commission found from the evidence in the record:

> "The record clearly shows that the ferry terminals, vessels and other passenger facilities and services of Erie are maintained physically separate from the car float and lighterage equipment and other facilities used in the transporting freight across the Hudson

River and that the routes of the water freight service are entirely different from the route of Erie's Chamber Street ferry line. The ferry service and the lighterage service is therefore analogous to two extensions of lines of railroad, one of which is used exclusively to transport passengers and the other used exclusively to transport freight. Abandonment of all passenger operations over the extension used exclusively in transporting passengers in such circumstances amounts to a complete abandonment of a line of railroad for which our authorization is required under section 1(18)." (Ap. D., p. 65).

From 1930 to date, despite a substantial increase in population of the area it serves, Erie passenger patronage has gradually dwindled and Erie has incurred substantial annual losses in its passenger operations for many years. Part of said losses were incurred by it in the operation of its passenger ferry service. In this connection, Commission found:

"During the years 1953, 1954 and the first nine months of 1955, in order, the operation of the ferry resulted in net annual deficits of $1,247,652, $1,000,912 and $721,433." (Ap. C, p. 49).

Lackawanna, an interstate railroad which owns and operates a railroad terminal on the Hudson River about a half mile north of Erie's passenger terminal, also suffered severe annual losses in its passenger service. Erie and Lackawanna made a joint study from which it was concluded that Erie could reduce its passenger deficit by $3,254,588 per annum under a coordinated plan with Lackawanna whereby Erie would transfer its passenger train operations from its Jersey City terminal to Lackawanna terminal in Hoboken and discontinue its passenger ferry service. A plan was developed to effect such saving.

To carry out said plan Erie and Lackawanna filed a joint application with Commission for approval of a trackage rights agreement. Commission by certificate and order dated August 27, 1956, authorized Erie to use, jointly with Lackawanna, Lackawanna's tracks, station facilities and ferries.

The change-over was completed in March, 1957, when all Erie passenger trains, except those of the Northern Branch, were re-routed to Hoboken. Susquehanna trains which used Erie terminal under contract also continued to use said Jersey City terminal. To make the plan wholly effective Erie, on or about February 10, 1956, filed an application with Commission for leave to abandon its passenger ferry service between Jersey City and New York City. Subsequently applications were also filed by Susquehanna and the Trustee for abandonment of use, under contract, of said ferry line.

Testimony concerning these applications was taken on six separate days. Examiner filed a report in which he found, among other things:

1. Thus, during the periods shown (1953, 1954 and the first nine months of 1955), the operations (ferry) have resulted in net annual deficits of $1,247,652, $1,000,912 and $721,433.

2. That adequate substitute service between Erie Jersey City terminal and downtown New York and Erie Jersey City terminal and 33rd Street, New York, was available to Northern and Susquehanna passengers at Erie terminal through the facilities of Hudson & Manhattan Railroad Company which operates a railroad under the Hudson River and has a station at Erie terminal, Jersey City.

3. That adequate substituted service to 42nd Street, Manhattan, was available to Northern and Susquehanna passengers at "Susquehanna Junction", North Bergen, New Jersey, via Public Service busses which render direct

service at such junction to and from Port Authority bus terminal, midtown Manhattan, via Lincoln Tunnel.

4. That the facilities of the Hudson & Manhattan and Public Service busses were used each day by a substantial number of railroad passengers from Erie's Jersey City terminal and from Susquehanna Junction, even though Erie ferry service was available.

5. That the facilities of Hudson & Manhattan and Public Service busses were sufficient to handle all of the passengers taking the Erie ferry.

6. That there were about 2300 Northern and Susquehanna passengers in each direction each day, about 60% of whom used the ferry.

7. That the cost to daily commuters on Northern and Susquehanna who used Erie ferry service would be increased about $7.00 per month per person through use of said alternate service.

Examiner recommended that Commission, subject to imposition of conditions to protect the carrier employees, find that present and future public convenience and necessity permit abandonment by Erie of its said ferry line and abandonment of the use of said ferry, under contract, by Susquehanna and Trustee.

State and Board filed exceptions to said Examiner's report.

Erie petitioned Commission to omit intermediate decision by Division 4, which petition was granted. The matter was argued before the Commission on May 21, 1957. Commission's report was filed on June 26, 1957 in which it found that it had jurisdiction over the subject matter and that present and future public convenience and necessity permit abandonment by Erie of its passenger ferry line across the Hudson River and abandonment of use, under contract, of said ferry by Susquehanna and Trustee.

It issued its order and certificate authorizing abandonment of said ferry from and after fifty days from the date of its order.

State and Board filed a petition for reconsideration and modification of effective date of said order and contended that Commission had not made adequate *quasi* jurisdictional findings, essential to the constitutional and statutory validity of its order, in connection with their contention that Commission had no jurisdiction over the subject matter.

Commission filed a report on the petition of the State and Board for reconsideration on August 14, 1957 in which it found the jurisdictional facts which we have quoted on page 5 *supra*. It issued an order affirming its report and order of June 26, 1957 and denying the petition of the State and Board.

State and Board filed a complaint in the District Court on August 9, 1957 to set aside the Commission's order and certificate of public convenience and necessity. They also applied to the District Court for an order staying the effective date of the Commission's order.

On August 15, 1957 the District Court, three Judges sitting, granted the motion of the State for a preliminary injunction.*

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* State filed a petition with Board on July 30, 1957 praying that the Board direct Erie to continue the operation of its passenger ferry line between Jersey City and New York City on and after August 15, 1957. The Board issued an order to show cause on said petition directed to Erie and Susquehanna. On the return day Erie moved for a dismissal on the ground that Board lacked jurisdiction over the subject matter under the Commerce Clause of the United States Constitution and on the further ground that jurisdiction over the subject matter had been vested in and assumed

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State's suit was brought against United States and the Commission. Erie and Susquehanna were given leave to intervene as defendants, Brotherhood was given leave to intervene as a plaintiff.

Argument before the Three Judge District Court was had in October, 1957 and that Court, on December 10, 1957, rendered its decision annuling the Commission's certificate and permanently enjoining Commission from permitting it to become effective.

The suit of State and Board to set aside certificate of Commission permitting abandonment by Central of its "Weehawken Ferries" was also heard by the same District Court that heard the case at bar. Both decisions were rendered the same day. The District Court in its opinion in the case at bar referred to its reasoning in its Central decision, consequently it will be necessary for us to refer to both decisions in this Statement.

The District Court rested its decision on the single ground that the Commission did not have jurisdiction to grant Erie's application. Its holding was that a complete termination of Erie's passenger ferry operations would

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by Commission. Board overruled these objections and entered an order on August 12, 1957 directing Erie to "continue the operation of its passenger ferry service between Jersey City, New Jersey and Chambers Street, New York City, New York on and after August 15, 1957" and that Susquehanna "continue its use under contract, of said passenger ferry service, pending a final determination by the Board in this proceeding or until further order of this Board". After the entry of the order herein appealed from, an appeal from Board's order was perfected. The cause is now pending in the Superior Court, Appellate Division, of New Jersey. It is anticipated that the Supreme Court of New Jersey will grant certification.

not constitute an abandonment under Section 1(18) but would merely be a partial discontinuance of service over which Commission had no jurisdiction.

The reason District Court held that Commission had no jurisdiction under Section 1(18) was that Erie was transporting freight across the Hudson River by car float and lighter and will continue to do so after the termination of the ferry line as proposed. These continuing freight operations, in the view of District Court, transformed an abandonment of a ferry line, which would otherwise clearly have been subject to Commission's jurisdiction, into a partial discontinuance of service over which Commission had no jurisdiction. In so holding, District Court gave no weight to the fact that such freight operations across the Hudson River are entirely separate from the passenger ferry operations. They are carried on between points other than the passenger ferry terminals by facilities that are not and could not be used in the passenger ferry operations. District Court did not accord any weight to the Commission's extensively considered and carefully formulated jurisdictional findings or to the Commission's conclusion therefrom that it had jurisdiction over the proposed abandonment of the ferry line under Section 1(18). Furthermore, District Court gave no weight to the fact that Commission has exercised jurisdiction over all railroad ferry abandonments from 1922 to date.

District Court, because of its decision on the question of jurisdiction, did not pass upon plaintiff's arguments relating to Commission's findings on the question of public convenience and necessity. Therefore, if this Court reverses on the jurisdictional point and remands the case to the District Court, that Court might set aside Commission's findings and conclusion that abandonment should be permitted in the public interest as was intimated by the Court in the *Central* case. Such action on the part of

the District Court would violate the principal repeatedly announced by this Court that courts should not substitute their judgment for that of the Commission as to what is required in the public interest, provided only that the Commission's conclusion has a rational basis in the record. A reading of the Commission's reports (Ap. A and C annexed hereto) will demonstrate that there is evidence in the record sufficient to support Commission's findings and conclusion of public convenience and necessity.

The foregoing are not the only indications of further adverse action by the District Court if the case is remanded to it. The District Court in its Central opinion suggests also that there was a possible separate impediment to effectuating the Commission's certificate, *i.e.*, that it might be "an invasion and usurpation of the jurisdiction of the States of New Jersey and New York"; this notwithstanding that appellant's ferries engaged in nothing but interstate commerce and that Section 1(20) explicitly provides that upon issuance of the Commission's certificate, a railroad may proceed thereunder "without securing approval other than such certificate."

In these circumstances, we shall, as later herein set forth, ask this Court, if this appeal is heard, not only to reverse the District Court on the jurisdictional issue but also to pass upon the sufficiency of the evidence to support Commission's certificate. In no other way can Erie obtain the relief to which it believes itself to be clearly entitled and which it urgently needs, without the extensive delay which would be entailed in the event of a reversal by this Court on the jurisdictional issue followed by an adverse decision by the District Court on the evidential issue and a subsequent second appeal to this Court.

The Questions Presented Are Substantial

A. *The Jurisdictional Issues*

The jurisdictional questions presented by this case have an importance which transcends the rights of the litigants here involved.

These issues are of importance to the railroad industry and the administration of the Interstate Commerce Act. They relate to a conflict of jurisdiction over interstate commerce between the National Government, through Commission, and the States. This Court has always been "the final arbiter of the competing demands of State and national interests." The jurisdictional issues involved in this appeal are similar to those raised by *Board of Public Utility Commissioners of New Jersey* v. *United States, et al,* 158 Fed. Supp. 98 (U. S. D. C., N. J. 1957) in which an appeal was taken on January 31, 1958.

Moreover, the solvency of Erie and other railroads[1] may hang on the determination of the jurisdictional issues in this case. The out-of-pocket losses incurred by Erie in the operation of the ferry, in and of themselves, are a cause for national concern because they imperil the financial stability of one of the Nation's major transportation lines.

Substantial questions of Federal jurisdiction are squarely presented because the effect of the District Court's decision is to:

> (a) Modify, if not set aside entirely, Commission's 36-year-old determination under Section 1(18) of the Interstate Commerce Act that it has jurisdiction over all abandonments of interstate railroad passenger ferry lines.

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[1] In addition to Erie and New York Central, Lackawanna and Central Railroad Company of New Jersey also operate trans-Hudson ferry lines.

(b) Constrict the jurisdiction of Commission over interstate commerce in opposition to the basic philosophy of the Transportation Act of 1920.

(c) Create an area of interstate commerce that may not be subject to control either by Commission or any State regulatory body.

(d) Create, unnecessarily, an area of conflict between Commission and Board, as well as between Board and regulatory bodies of other States.

1. Commission's interpretation of Section 1(18).

Commission was given control over the extension and abandonment of all or any portion of a line of railroad, including ferries, by the Transportation Act of 1920. (49 U. S. C. Sec. 1(3)(a) (18 to 20) and (22)). The only restriction to the sweep of these sections is contained in Section 1(22) which provides as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Commission was first called upon to exercise jurisdiction under these statutes in connection with the abandonment of a ferry line (1922). Since that time at least twenty other[2] applications have been made to Commission by rail-

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[2] *Application of Chesapeake & Ohio to abandon a portion of its line of railway*, 71 I.C.C. 450 (1922); *The Abandonment and Construction of Lines by Louisiana Railway & Navigation Co.*, 99 I.C.C.

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roads for permission to abandon ferry lines. In each instance the Commission assumed jurisdiction of the subject matter. In at least four of the cases Commission jurisdiction was questioned by one or more parties.[3]

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731 (1925); *Abandonment of Portion of Line of Chesapeake & Ohio Railway Company*, 138 I.C.C. 73 (1928); *Abandonment of Ferry by N. Y. N. H. & H. R. Co.*, 150 I.C.C. 413 (1929); *Marquette & Bessemer Dock & Navigation Company Abandonment*, 187 I.C.C. 177 (1932); *Atchison, Topeka & Santa Fe Railway Co. et al. Abandonment Operation, etc.*, 189 I.C.C. 695 (1933); *Delaware River Ferry Company Abandonment of Operation*, 212 I.C.C. 580 (1936); *Southern Pacific Coast Railway Co., et al., Ferry Abandonment*, 217 I.C.C. 277 (1936); *Pennsylvania & Grand Trunk Western Car-Ferry Operation, etc.*, 217 I.C.C. 531 (1936); *Atchison, Topeka & Santa Fe Railway Co. Abandonment of Operation*, 224 I.C.C. 428 (1938); *North Western Pacific Railway Co. Ferry Abandonment*, 236 I.C.C. 181 (1939); *Texas and Pacific Railway Co., et al.*, 247 I.C.C. 285 (1941); *Central R. Co. of N. J. Trustees Ferry Abandonment*, 249 I.C.C. 269 (1941); *Gulf & Inter-State Railway Co. Texas Abandonment*, 249 I.C.C. 659 (1941); *Erie Railroad Co. Ferry Abandonment*, 252 I.C.C. 659 (1942); *Hoboken Ferry Co. Abandonment*, 267 I.C.C. 51 (1946); *Chesapeake & Ohio Ferry Abandonment*, 267 I.C.C. 788 (1948); *New York, Philadelphia & Norfolk R.R. Co., et al., Ferry Abandonment*, 290 I.C.C. 249 (1954); *Delaware, Lackawanna & Western R.R. Co. Ferry Abandonment*, 290 I.C.C. 809 (1954); and *New York Central Railroad Company Ferry Abandonment*, 295 I.C.C. 385 (1957).

[3] *Abandonment of Ferry by N. Y. N. H. & H. R. Co.*, 150 I.C.C. 413 (1929) on the ground that the ferry was wholly intrastate in character); *Delaware River Ferry Co Abandonment*, 212 I.C.C. 580 (1936) (on the ground that the ferry was not in fact a portion of a line of railroad); *New York, Philadelphia & Norfolk R.R. Co., et al., Ferry Abandonment*, 290 I.C.C. 249 (1954) (on the ground that the ferry company was an independent contractor and not subject to the jurisdiction of the Commission). *Delaware, Lackawanna & Western R.R. Ferry Abandonment*, 290 I.C.C. 809 (1954) (Hoboken to Christopher St.), affirmed in *Board of Public Utility Commissioners of New Jersey* v. *United States*, 132 F. Supp. 379 (D. N. J. 1955).

In five of the cases cited in note 2 *supra*, abandonment of trans-Hudson railroad passenger ferries was sought by railroads which also were engaged in transporting freight across the Hudson River by lighter and car floats.[4]

Appeals were taken to Statutory Courts in two of the five cases. The Commission's action was sustained in both cases.

In *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382 (1932), 76 L. Ed. 808, 52 S. C. 440, this Court held that Section 1(18) of the Interstate Commerce Act required a railroad engaged in interstate commerce to obtain a certificate of public convenience and necessity from Commission before it extended its line of railroad across Chesapeake Bay by means of a ferry between two points in Maryland.

Commission's long standing administrative interpretation of Section 1(18) should have been accorded great weight by the District Court. *Helvering* v. *Winmill*, 305 U. S. 79 (1938) 83 L. Ed. 52, 59 S. C. 45; *Norwegian Nitrogen Products* v. *United States*, 288 U. S. 294 (1933), 77 L. Ed. 796, 53 S. C. 350.

Furthermore, Commission's conclusions of law and its findings of fact on the jurisdictional issue should have

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[4] *Central R.R. of N. J. Trustees Ferry Abandonment*, 249 I.C.C. 269 (1941) (Jersey City to W. 23rd Street); *Erie R.R. Co. Ferry Abandonment*, 252 I.C.C. 659 (1942) (Jersey City to W. 23rd Street); *Hoboken Ferry Co. Abandonment*, 267 I.C.C. 51 (1946) (Hoboken to W. 23rd Street), affirmed in unreported opinion of a three-judge court in *West 23rd Street Ferry Assoc., Inc.* v. *The Hoboken Ferry Co.* (Civil Action 39-370, S. D. N. Y., April 18, 1947); *Delaware, Lackawanna & Western R.R. Ferry Abandonment*, 290 I.C.C. 809 (1954) (Hoboken to Christopher Street), affirmed in *Board of Public Utility Commissioners of New Jersey* v. *United States*, 132 F. Supp. 379 (D. N. J. 1955).

been accorded substantial weight by the District Court and should have been sustained by said Court since there was a rational basis for the Commission's conclusions. *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 672 (1946), 91 L. Ed. 1158, 67 S. C. 931; *Gray* v. *Powell*, 314 U. S. 402, 411 (1941), 86 L. Ed. 301, 62 S. C. 326; *United States* v. *American Trucking Associations*, 310 U. S. 534 (1939), 84 L. Ed. 1345, 60 S. C. 1059; *United States* v. *Zucca*, 351 U. S. 91 (1956), 100 L. Ed. 964, 76 S. C. 671.

We have quoted Commission's ultimate findings on the jurisdictional issues on page 4 *supra*. They demonstrate that the Erie passenger ferry is a separate and distinct portion of a line of railroad, using its own terminals, boats and boat routes back and forth across the river. None of these facilities are used for the transportation of freight. District Court accepted said findings but held that since Erie also lightered and car floated freight across the Hudson, what Erie sought to accomplish was the partial discontinuance of service and not an abandonment of a portion of a line of railroad.

We recognize that Commission in *Public Convenience Application of Kansas City Southern Railway*, 94 I. C. C. 691 (1925), held that it had no jurisdiction under Section 1(18) over partial discontinuance of service. We believe Commission could have reached the opposite conclusion in that case with complete justification but accept that ruling as correct for purposes of this statement. This Court has never been called upon to pass upon that precise question although it cited the *Kansas City Southern* decision of Commission with approval in *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 (1939), 84 L. Ed. 93, 60 S. C. 34 and *Alabama Commission* v. *Southern R. R. Co.*, 341 U. S. 341, 346 (1951), 95 L. Ed. 1002, 71 S. C. 762.

Even in the light of its own distinction between abandonments and partial discontinuances, Commission has ex-

perienced no difficulty in treating ferry abandonments as abandonments of portions of lines of railroad under Section 1(18) and not as partial discontinuances of service.

To support its conclusion that the proceeding before Commission involved a partial discontinuance of service rather than an abandonment of a portion of a line of railroad within the meaning of Section 1(18), District Court referred to certain facts and drew certain analogies. It pointed to the fact that Erie passenger and freight ferries have one general superintendent and one set of repair facilities as supporting its conclusion that all Erie marine activities on the Hudson River constitute the operation of a single line of railroad (Ap. A., p. 28).

These facts have no relevance in determining whether any particular part of the Erie System is a portion of a line of railroad within the meaning of Section 1(18) because Erie has a number of separate branches of its railroad that operate in Jersey City. All of these separate branches are supervised by one general superintendent. All of the engines, cars and other facilities used on these lines are repaired in the same shops. Such procedures increase efficiency and reduce operating costs.

District Court, in its Erie decision, referred to its *Central* opinion. In that opinion, the District Court discussed the analogy of bridges and tunnels and said (Ap. B., p. 39):

> "And if the railroad had such a bridge or tunnel over which part of its traffic moved while the rest traversed the river by boat, an attempt to discontinue either boat or tunnel traffic while retaining the other would be only partial discontinuance of service and not an abandonment of a line or a portion of a line of railroad over which the Commission would have jurisdiction."

It seems to us that this analogy destroys the distinction the District Court drew. If the District Court were correct, Commission would never have jurisdiction over any abandonment of a portion of a line of railroad where the abandoning railroad operates over more than one line between two points, one of which it seeks to abandon. Jurisdiction has been exercised over such applications by Commission and its orders have been affirmed by this Court.

New York Central had three lines of railroad running from Yonkers, New York, to New York City. One line was used for passenger and freight operations, the other two lines were used for passenger operations. Railroad sought Commission's permission to abandon one of the two passenger lines. Commission issued its certificate authorizing abandonment. This Court affirmed the action of Commission in a protracted litigation which terminated in *Yonkers* v. *United States*, 323 U. S. 675 (1944), 89 L. Ed. 548, 65 S. C. 130.[5]

Long Island Railroad operated two lines of railroad between two points on Long Island. One branch was on a long trestle across a body of water, the other via a land route. The trestle was destroyed by fire. The Trustee of the defunct railroad sought permission of the Bankruptcy Court to apply to Commission for leave to abandon the portion of the line of railroad that operated over the bridge. The Public Service Commission of New York contended that Commission had no jurisdiction over such an abandonment. The Court held that exclusive jurisdiction over such an abandonment was vested in Commission and granted trustee's application. *In re Long Island R. Co.*, 92 Fed. Supp. 85 (D. C. E. D. N. Y., 1950).

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[5] 50 Fed. Supp. 497 (D. C. S. D. N. Y., 1943), reversed and remanded 320 U. S. 685, 88 L. E. 400, 64 S. C. 327 (1944), stay of mandate 321 U. S. 745, 88 L. E. 1048, 64 S. C. 517 (1944), case on remand 56 Fed. Supp. 351 (D. C. S. D. N. Y., 1944), aff'd per curiam 323 U. S. 675, 89 L. E. 548, 65 S. C. 130 (1944).

In the *Los Angeles Union Terminal* cases[6] this Court held that where a railroad was required to abandon certain tracks in the City of Los Angeles and construct certain other tracks in said City, in order to bring its railroad into a union terminal, Commission had exclusive jurisdiction over such abandonment of tracks and such extension of lines despite the fact that the railroad carried freight on other lines in the City of Los Angeles.

The factual situation which the District Court visualized actually exists in the Port of New York. Pennsylvania Railroad owns a tunnel under the Hudson River through which it runs all of its passenger trains into and out of New York City. However, it transports all of its freight across the Hudson River by means of lighters and car floats. Would anyone contend that the railroad running through the tunnel is not a portion of a line of railroad within the meaning of Section 1(18)?

These four examples are at least sufficient to indicate that substantial questions are presented concerning the correctness of the jurisdictional findings of District Court, even though they may not be sufficient to establish, as Erie contends, the clear error committed below.

2. District Court's decision is contrary to the intention of Congress.

This Court has held that, in keeping with the National Transportation Policy of Congress, the Transportation Act of 1920 should be broadly construed in favor of vesting Commission with jurisdiction over all phases of interstate

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[6] *Railway Comm.* v. *Southern Pacific Ry. Co.*, 264 U. S. 331 (1923), 68 L. E. 713, 44 S. C. 376; *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380 (1931), 75 L. E. 1128, 51 S. C. 553; *I.C.C.* v. *Los Angeles*, 280 U. S. 52 (1929), 74 L. E. 163, 50 S. C. 53.

transportation. In *Texas & Pacific R. Co.* v. *Gulf, etc. Ry.*, 270 U. S. 266, 277 (1926), 70 L. Ed. 578, 46 S. C. 263,[7] this Court said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

This Court should take judicial notice of the current financial plight of Erie and other American railroads. They are faced with chronic deficits arising out of passenger operations that are a serious threat to their ability to continue to operate. In the current case Commission found that Erie would save approximately a million dollars a year as a result of the ferry being abandoned. This

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[7] To the same effect see also *Piedmont & Northern Ry. Co.* v. *I.C.C.* 286 U. S. 299, 311 (1932), 76 L. E. 1115, 52 S. C. 541; *Transit Commission* v. *U. S.*, 289 U. S. 121, 127 (1933), 77 L. E. 1075, 53 S. C. 536; *Colorado* v. *U. S.*, 271 U. S. 153 (1926), 70 L. E. 878, 46 S. C. 452; *Texas* v. *U. S.*, 292 U. S. 522 (1934), 78 L. E. 1402, 54 S. C. 819.

saving will go far toward the preservation of Erie's solvency and the continuation of its policy to serve as an essential link in the National transportation system. Because of the sectionalism that is brought into operation by the abandonment of any existing railroad facility, it is of extreme importance that questions of abandonment such as those here presented should be considered by a national body.

3. States cannot control interstate commerce.

Implicit in the District Court's decision is the concept that if Commission has no jurisdiction over the ferry abandonment Board would, of necessity, have such jurisdiction (Ap. B., p. 39). In fact, as we have pointed out on page 8 *supra*, Board has issued an order directing Erie to continue to operate the ferry until the further order of the Board. One of Erie's main contentions in the brief which it has filed on its appeal in New Jersey from said order is that since the ferry is engaged solely in interstate commerce between two States, Board has no jurisdiction over its operation, even upon the assumption that Congress has not acted to vest jurisdiction over ferry abandonments in Commission.[8]

We do not propose to argue the merits of that appeal in this statement, save to say that the constitutionality of the statute under which the Board acted is dubious. (N.J.S.A. 48:2-15 (1957)). If that statute is declared to be unconstitutional by the Supreme Court of New Jersey, the

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[8] In Central opinion (p. 102) District Court stated that Baltimore and Ohio had recognized State authority over its passenger service between Washington and New York. This is an error. Baltimore and Ohio applied to Pennsylvania, Delaware and Maryland with respect to intrastate commerce engaged in by its trains in said States. It filed no application in New Jersey where said trains did not engage in intrastate commerce and it has contested New Jersey's attempt to assert jurisdiction in the matter.

extension and abandonment of railroad ferries in the Hudson River will not be subject to any control if District Court's opinion is permitted to stand.

The intention of Congress with respect to the jurisdiction of States over interstate commerce seems to be contained in the proviso of Section 1(17) of the Interstate Commerce Act which provides as follows:

> "That nothing in this Act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for *intrastate* business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act." (Emphasis supplied)

It is manifest that Commission, as representative of the Nation, has been vested with the responsibility of properly implementing our national transportation policy. In carrying out said policy, Commission must be motivated by a desire to regulate, justly and uniformly, those facets of commerce subject to its control without regard to local passions, pressures or prejudices. To enable it to do so, the Transportation Act must be construed as giving to it the broadest jurisdictional powers.

The effect of District Court's decision is to deny Commission use of a most important tool without which it cannot carry out the Congressional mandate properly.

4. Conflicting jurisdiction.

One of the purposes of the Transportation Act was to centralize the regulation of interstate commerce. In *Transit Commission* v. *U. S.*, 289 U. S. 121, 127 (1933), 77 L. E. 1075, 53 S. C. 536, this Court said:

> "Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities

were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for."

The District Court's decision is in direct opposition to this policy. Furthermore, the District Court not only assumed that the regulatory bodies of New York and New Jersey would have jurisdiction over the ferry abandonment, but it also assumed that they would act in concert on the matter. What would Erie's position be if Board ordered it to continue the operation of said ferry but the New York Public Utility Commission ordered it to discontinue the operation thereof? The question would then arise as to which, if either, of these bordering States would be permitted to impose its sovereign will on the other. We submit that it is the function of our Courts to construe Section 1(18) in such a manner as to minimize this source of conflict and thus give effective protection to the sovereignty of our several States as well as to Interstate Commerce.

B. *The question as to the sufficiency of the evidence to support the Commission finding of public convenience and necessity.*

Lastly, Erie, relying on the jurisdiction of Commission to decide this matter, seeks review of the question of whether or not there was substantial evidence before the Commission when it issued its certificate of public convenience and necessity allowing abandonment of the portion of a line of railroad. A decision upon this point, clearly raised on the record (Ap. A., p. 28) will dispose of the whole case. In addition, the decision will be instrumental in preventing the continuance of the tremendous losses suf-

fered by Erie in the operation of the ferries. If the decision by this Court remands the case to the District Court for a consideration of the sufficiency of evidence presented before the Commission and there is a decision reversing the Commission's determination on the merits, then the lengthy prospect of review stretches before Erie once more. During all of this period there will be, of course, a continuance of ferry service and the concomitant growth of the burden of loss already sustained in its operation by Erie. This Court has often disposed of an issue not considered by the lower court for these very reasons. *McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 429, 71 L. Ed. 316, 47 S. C. 144 (1926); *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 685, 79 L. Ed. 1110, 55 S. C. 595 (1935); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 449, 87 L. Ed. 892, 63 S. C. 692 (1942).

CONCLUSION

The questions presented by this appeal are substantial and of urgent importance to the Erie. They are also of national importance because of the principles involved and because of the effect of the decision below on the Erie, on the railroad industry as vital elements in the nation's economy and upon the jurisdiction of Commission. We respectfully ask that probable jurisdiction be noted.

Respectfully submitted,

CHARLES W. HUTCHINSON,
Attorney for Appellant,
Erie Railroad Company.

RAYMOND J. LAMB,
FREDERICK G. HOFFMANN,
Of Counsel.

Dated: April , 1958.

Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL No. 802-57

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY and THE STATE OF NEW JERSEY,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

ERIE RAILROAD COMPANY and NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,

Intervenors.

Opinion of Statutory Court

Before McLAUGHLIN, Circuit Judge, and SMITH and WORTENDYKE, District Judges.

By McLAUGHLIN, Circuit Judge.

The New Jersey agency administering that state's regulatory powers over public utilities and the state itself bring this action [1] which is in effect an appeal from the order of the Interstate Commerce Commission dated August 14, 1957, which, on the petition of the present plaintiffs for

[1] Under 28 U.S.C. §§1336, 1398, 2284, 2321-2325 and 5 U.S.C. §1009.

reconsideration and modification of effective date, affirmed its jurisdiction and sustained its Report and Certificate of June 26, 1957, permitting abandonment of Erie Railroad Company's passenger ferry service across the New York Harbor between Jersey City, New Jersey and New York City, New York, and abandonment of use of that service by the New York, Susquehanna and Western Railroad Company and the Trustee of the New Jersey and New York Railroad Company. The two railroads and the Brotherhoods of Railroad Trainmen and Locomotive Engineers have been allowed to intervene, the railroads as defendants, the brotherhoods as plaintiffs. The operation of the ferry by a predecessor of the Erie dates back to 1856. The original authorization for the ferry was for carriage of both passengers and freight.

The identical and decisive jurisdictional problem decided by this court today in Board of Public Utility Commissioner of the State of New Jersey, et al. v. United States of America, et al., Civil Action No. C1-559-57 (New York Central Weehawken Ferry suit), appears in this case.

As in the New York Central action, the Commission asserts that it possesses the authority to allow the discontinuance of the Erie ferry by virtue of Section 1(18) of the Interstate Commerce Act, inserted by 41 Stat. 477 (1920), as amended 49 U.S.C. §1(18) (1952). This reads:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction,

> or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

The factual situation as far as the Commission's jurisdiction is concerned is substantially similar to that in the New York Central litigation where, as in this suit, it was the passenger ferry service alone that was sought to be abandoned. As the Commission states in its report on the petition for reconsideration in the matter: "*There* (*New York Central case*), *as in the present proceeding,* the same petitioners contended we were without jurisdiction to consider requests to abandon a 'ferry', or to permit abandonment of only passenger operations if the applicant also transported freight between the same points and would continue to do so after abandonment of the ferry. * * * *The record supports the conclusion that the equivalent of the situation there exists here.*" (Emphasis supplied)

We add very briefly that the Erie passenger and freight rail services come into its Jersey City terminus for water transportation across New York Harbor to the end, or rather the beginning, of the line, New York City. The Commission found, much as in its New York Central opinion, that:

> "The record clearly shows that the ferry terminals, vessels and other passenger facilities and services of Erie are maintained physically separate from the car float and lighterage equipment and other facilities used in the transporting freight (sic) across the Hudson River and that the routes of the water freight service

are entirely difficult from the route of Erie's Chamber Street ferry line."

As in the Central litigation there is nothing substantial in the record before us to justify the Commission holding that there is such a distinction between the passengers and freight ferry services of the one line coming into Jersey City, after these services are water-bound for the railroad's terminus, New York City, as to turn them from one railroad line into two or more.

The passenger and freight ferries have the one general superintendent; they have the one set of repair facilities. The freight trains of the line do not unload or load in the passenger terminal at Jersey City. That would be extraordinary practice of which there may be an isolated instance, though none has been brought to our attention. The freight depot is adjacent to the passenger station. The freight ferries are immediately north of the Erie Jersey City passenger ferry slips. On the Manhattan side, the freight carfloats and lighters of course do not land in the passenger ferry slips. As we pointed out in the New York Central opinion, for the speedy and comfortable water transportation of human beings, special passenger boats are furnished, and the freight is delivered on its own special water conveyances, on its own convenient schedules, to adjoining piers or where trackage is available for the freight cars on the floats.

Common sense governs the methods of passenger and property water transportation by the Erie Railroad line to and from its final destination, New York City. But common sense does not support the proposition that the mere dropping of the harbor passenger service from its passenger and freight carrying railroad into New York City brings the Erie within Section 1(18) of the Act and empowers the Commission to permit the discontinuance.

As in our New York Central decision, because we are satisfied that in this matter also the Commission is without

Jurisdiction to permit the defendant railroad to abandon its passenger ferry service, we will not, at this time, pass upon the other questions raised by the plaintiffs.

Such findings of fact and conclusions of law as are necessary to our decision are expressed in this opinion.

The order of the Commission dated ..ugust 14, 1957, affirming its jurisdiction and sustaining its Report and Certificate of June 26, 1957, is in excess of the statutory powers of the Commission and will be set aside and for nothing holden. Decree to be submitted.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 559-57

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, and the STATE OF NEW JERSEY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

Defendants,

and

NEW YORK CENTRAL RAILROAD COMPANY,

Intervenor.

Opinion of Statutory Court

Before:

McLAUGHLIN, Circuit Judge, and SMITH and WORTENDYKE, District Judges.

By: McLAUGHLIN, Circuit Judge.

This action, under 28 U. S. C. §§ 1336, 1398, 2284, 2321-2325 and 5 U. S. C. § 1009, is brought by the New Jersey agency administering that state's regulatory powers over public utilities and by the state itself. It arises from the Order of the Interstate Commerce Commission of May 15, 1957 which on petition for reconsideration filed by these plaintiffs and others, affirmed the jurisdiction of the Commission and sustained the report, order and certificate of its Division 4, permitting abandonment by the New York Central Railroad of its ferry service across the Hudson

River between Weehawken, N. J. and New York City, N. Y. The New York Central Railroad has been allowed to intervene as a defendant. The Counties of Rockland, New York, and Bergen, New Jersey; the New Jersey municipalities of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood, Ridgefield Park, Teaneck and Weehawken, the Citizens United Transit Committee, an unincorporated association of West Shore commuters; the Brotherhoods of Railroad Trainmen and of Locomotive Engineers; and Robert J. Kilpatrick are plaintiff-intervenors. The Public Service Commission of the State of New York has been permitted to appear as *amicus curiae*.

The New York Central Railroad or its predecessors since 1883 have furnished railroad passenger and freight service on the West Shore line (now known as the River Division) along the west bank of the Hudson River between Albany, New York City, by way of Weehawken, New Jersey. The final portion of the line is a passenger and freight water service across New York Harbor from Weehawken to Manhattan. The application to the Commission for leave to abandon the passenger ferry service is part of an overall effort by the railroad to put an end to its West Shore passenger service, because of alleged serious financial losses in connection therewith though at the same time retaining its profitable freight operation on that line.

The dispositive question here is one of jurisdiction. Has the Commission the power to permit this railroad to discontinue its passenger ferry service across the Hudson River between Weehawken, New Jersey and New York City? The sole source of authority claimed by the Commission and urged by the carrier is Section 1, Paragraph 18 of the Interstate Commerce Act, inserted by 41 Stat. 477 (1920), as amended 49 U. S. C. § 1(18) (1952). That reads:

Appendix B

"No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public conveniences and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, *and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.* * * *" (Italics supplied.)

It is to the italicized portion that the Commission and railroad point. There can be no possible doubt about the validity of the applicable principle derived from that language. It is that the Commission has no right to permit only a partial discontinuance of the operations over a particular railroad line. Plainly Section 1(18) above bestows no such right. What the Commission and railroad insist upon is that the present situation involves the complete abandonment of a portion of a line of railroad and not simply a discontinuance of the passenger service of that portion of the line; therefore, that it is within the province of the statute.

That ferries are included within the definition of "railroad" is evidenced by Section 1(3) of the Act which provides that "The term 'railroad' as used in this part shall include all * * * ferries used by or operated in connection with any railroad". The Commission has jurisdiction over

the establishment of rates payable including those payable by passengers riding on railroad-operated ferries who do not, concomitant with their ferry travel, also ride on trains. N. Y. Central R. R. v. Hudson County, 227 U. S. 248 (1913). It is equally sound that the Commission possesses the right to allow complete abandonment of a railroad branch line through the latter be located wholly within a state. *Colorado* v. *United States,* 271 U. S. 153 (1926). Under that opinion if the contemplated stoppage of the Weehawken passenger ferry effects the complete abandonment of a line of railroad or portion of a line of railroad, the Commission's action was proper. If it is merely the elimination of part of the service of that line, the Commission has no justification for assuming control of the proceeding.

The problem is one of first impression as far as the courts are concerned. It is asserted that the socalled Lackawanna case[1] is squarely against the jurisdictional arguments of the plaintiffs. Actually, the Commission's jurisdiction was not challenged in that litigation, was never before the court and not passed upon by that court. Some reference is made to an unpublished memorandum opinion in West 23rd Street Ferry Association, et al. v. The Hoboken Ferry Company, et als. (S. D. N. Y., Dec. 31, 1946, C. A. 39-370). That was on motion for a stay. There is not the slightest indication from the extremely short opinion that the plaintiff had raised the question at all and the indications from the Commission hearing are to the contrary.

Following the 1920 bestowal upon the Commission of authority to allow abandonment of a line or portion of a line of railroad, that body in a series of opinions sharply distinguishing between partial discontinuance of service

[1] Board of Public Utility Commissioners of New Jersey v. United States, et als., 132 F. Supp. 379 (1955).

and complete abandonment of a line or of a portion thereof, held that discontinuance of passenger service where the freight operation was being maintained was not the complete abandonment of a line of railroad called for by Section 1(18) and consequently was beyond the power of the Commission to grant. In Kansas City Southern Ry. Co. Application, 94 I. C. C. 691, 692 (1925) there was a proposed discontinuance of regular passenger and freight service with the lines involved continuing to operate intermittent freight service. The Commission held that the application "is not an abandonment within the meaning of that term as used in paragraph 18 of Section 1 of the Act and that we are, therefore without jurisdiction under that section to authorize such partial discontinuance of service". In Morris and Essex Railroad Co. Abandonment, 175, I. C. C. 49, 52 (1931) the application asked for total abandonment, both freight and passenger, of a portion of a railroad line and of just the passenger service of the balance. The New Jersey Board of Public Utility Commissioners had denied a similar petition. The Commission recognized its jurisdiction over the first part of the application but, holding it had no authority over the second and that the latter was an essential constituent of the application, denied the entire request.

Within a year there was a third major Commission ruling on this same subject in Norfolk & W. Ry. Co. Abandonment, 187 I. C. C. 66 (1932). On branch of the petition in that case asked for "abandonment of service, with the exception of daily freight service * * *." This was dismissed "as curtailment of service is not within the purview of Section 1(18) of the act". Other Commission opinions forcibly reiterating the doctrine are: Chicago N. S. & M. Ry. Abandonment, 290 I. C. C. 765, 766 (1955); Express Service at Borden, Campbelisburg, and Pekin, Inc., 285 I. C. C. 303, 305 (1952); Chicago, B. & Q. R. Co. Control, 271 I. C. C. 63, 67 (1948); New York Central R.

Co. Abandonment, 254 I. C. C. 745, 765 (1944); Boston & M. R. Abandonment, 249 I. C. C. 507, 508 (1941); Old Colony R. Co. Trustees, Abandonment, 244 I. C. C. 303, 334 (1941); New York, N. H. & H. R. Co. Reorganization, 239 I. C. C. 337, 381 (1940); Gulf, T. & W. Ry. Co. Abandonment, 233 I. C. C. 321, 331 (1939); Maine Central R. Co. Abandonment, 207 I. C. C. 97, 100 (1935).

The Supreme Court of the United States in Palmer v. Massachusetts, 308 U. S. 79 (1939), upheld the view of the Commission in refusing to permit the discontinuance of passenger service because of lack of Commission jurisdiction "over curtailments of service and partial discontinuance". Again, in Alabama Public Service Commission v. Southern R. Co., 341 U. S. 341, 346 Note 7 (1951), where the dispute centered around the discontinuance of passenger service, the court commented "This is a proposed partial discontinuance and not an abandonment over which the Interstate Commerce Commission is given exclusive authority under 49 U. S. C. §§ 1(18-20)". The statutory court in Gulf, etc. R. Co. v. Louisiana Public Service Commission, 120 F. Supp. 250 (E. D. La. 1954), ruling specifically on the discontinuance of passenger service by virtue of Section 1(18) held, at page 251, "Where, however, the railroad is merely discontinuing a portion of its service, whether it be passenger or freight, there is no abondonment under Section 1(18-20), State of Colorado v. United States, supra * * *".

The single franchise under which the West Shore Railroad (predecessor of the New York Central) operated across the Hudson River called for a unified passenger and freight service. The evidence is that "* * * they were an indivisible contract. They could not be separated". It is further established by the record that the New York Central intends to maintain its freight service under the

above franchise, simply discontinuing its passenger ferries.[2]

Contemporary state phases of this same controversy are most pertinent to the issue before us and should be noted. The New York Central, at the time of its application to the Interstate Commerce Commission with respect to its Weehawken Ferry, also sought permission from the New Jersey Public Utility Commission and the New York Public Service Commission to discontinue passenger traffic over its West Shore line, the branch concerned. Plaintiffs argue strongly that the railroad in those instances pursued the proper and ordinary course to be followed where simply partial abandonment of function is desired. Recognition of

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[2] Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382 (1932), among other things, is suggested by the defendants as removing charter powers from any decisional weight in this action; whether that thought is accepted or not, the instant charter powers undeniably reveal that New York Central's ability to cross New York Harbor is founded on the original combination passenger and freight franchise. But the Claiborne opinion is far more significant and helpful on the primary dispute in this suit, namely, jurisdiction.

Briefly, the Claiborne ferry was for the transportation of passengers and property under its franchise. It was a wholly owned subsidiary extension of the owner railroad. The petition of the railroad to the Commission for permission to operate the ferry for transportation of passengers and property was allowed. We have no quarrel with that, merely stating that if later the railroad had requested the Commission for the right to discontinue the passenger phase of the ferry extension of its line, the circumstances would be basically identical with the case at bar. However, because the Claiborne ferry dealt with a minor traffic condition it could handle its freight on the same vessel as the passengers. Therefore, though the distinction is more apparent than real, it is easy to recognize the validity of the proposition that discontinuance of Claiborne's passenger service by itself would have been beyond the jurisdiction of the Commission for it would have been only a portion of the service of the ferry extension of the railroad which was being cancelled and that could not have been accomplished under Section 1(18).

the state authority by a railroad line with respect to dropping one of two or more services is the usual procedure, witness the current request of the Baltimore & Ohio Railroad to the particular state boards for the rights to end its passenger service between Washington and New York.

Commenting on the very proposals of the New York Central to the State Utility Commissions for authority to discontinue West Shore passenger service, the Interstate Commerce Commission Examiner in his report to the Commission said, "As the discontinuance of passenger train service over trackage also used for freight service is not an abandonment of 'all or any portion of a line of railroad', jurisdiction to approve such proposals is not vested in the Commission".

The defendants admit that in discontinuing the passenger ferries, it is solely passenger and vehicular traffic which the railroad is stopping. They admit that the freight originating on the West Shore line, as do the passengers, and carried to the same Weehawken terminal will be brought to Weehawken as before and transported across New York Harbor by the same freight ferries as always. New York Central's petition to the New Jersey Utilities Board to drop West Shore passenger service coming into the Weehawken terminal is acknowledgment that its request is not under Section 1(18). Despite all this, defendants urge that the freight carriage bears no relation whatsoever to the passengers coming in on the same line and who continue their forward movement across the Harbor to New York City just as does the freight.

The Commission and the railroad strive at length to show a physical differentiation between the passenger and freight facilities. The Commission opinion states:

> "The ferry terminals, docks, vessels and other facilities and services of Central are maintained physically separate from the car float and lighter equipment and

other facilities used in transporting freight across the river. Neither the 42nd Street, nor the Cortlandt Street ferry terminals are served by railroad tracks. The services and materials provided for the freight and passenger operations are entirely distinct from each other, or, the charges for each are clearly separable according to regular accounting methods of assigning costs."

The distinctions outlined are without a difference. They fail utterly to indicate any substantial disassociation of the ferry from its rail member. On the whole record they do not support the Commission's thesis that the passenger and freight services of the one railroad line have suddenly become separate and independent lines because they are water-borne across the harbor to the end of the same one original line.

The thought that the passenger and freight traffic do not have the same docks on the New York side is *de minimus*. That municipality controls its waterfront and its water transportation ties up as the city directs. Commuter passenger traffic rightfully is given convenient disembarkation locations. The associated freight can well be accommodated in less favored spots; these may be some distance away and are probably far more satisfactory sites for freight delivery. The repair and maintenance facilities are the same for the passenger and freight vessels. They are repaired in the one shop by the one group and with the same equipment. The personnel handling the two services belong to the same union.

Defendants argue that after the one passenger and freight line arrives at Weehawken it divides into a number of separate branches to reach New York City, its final destination. Two branches are the passenger-carrying ferries to 42nd Street and Cortlandt Street; the others are the freight-carrying barges proceeding to numerous freight terminals and piers. The argument seems artificial and

contrived. It elicits a picture of a maze of branch line bridges and tunnels extending across the Hudson from Weehawken to all the points served on Manhattan. That unreal result can hardly be said to reasonably emanate from the simple fact of one line of railroad, passenger and freight, passing through Weehawken on its way to its terminus on the other side of the harbor.

With reference to harbor bridges and tunnels, if the railroad had a bridge across the harbor or a tunnel under it or access to either and if it were desirable from an operative standpoint, all its passenger and freight trains could move across the bridge or through the tunnel to Manhattan and there could be no attempt to differentiate between the services. There certainly could be no application to the Commission to abandon the passenger element of the harbor portion of the line. That move, if made, would be to the New Jersey Utility Commission and its New York counterpart.

And if the railroad had such a bridge or tunnel over which part of its traffic moved while the rest traversed the river by boat, an attempt to discontinue either boat or tunnel traffic while retaining the other would be only partial discontinuance of service and not an abandonment of a line or a portion of a line of railroad over which the Commission would have jurisdiction.

Absent a bridge or tunnel, passengers can be and are shifted far more quickly and conveniently on separate vessels instead of being delayed while the freight is unloaded from the railcars and loaded aboard boats. It is because of this that the West Shore passengers are sent across the harbor on special ferries while the West Shore freight follows when ready. The distinction between the ferry boats used for transporting passengers and the lighters and barges used for moving freight is no more significant in determining whether this is only one line of railroad than would be the distinction between freight and

passenger cars. The human and freight ferries are no more and no less than the continuance of the West Shore line to New York City. That being so, no amount of wordage, no hint that the judgment of the Commission should be accepted, and bestow jurisdiction of this cause upon that tribunal for there is none. The Congress may in its wisdom decide to grant the requisite authority, though as yet there is no intimation of this from the legislative history, but until that time, the Commission, strictly a creature of its creating statute, is without the power to permit the discontinuances of this partial service.

Regarding the second section of this suit, which attacks the Commission's determination of public convenience and necessity, we have serious doubts of the adequacy of the findings of fact and of their support by substantial evidence, but because of the definitive conclusion of lack of jurisdiction we do not pass upon the point at this time.

A third problem is the specific contention that the Commission's decision is an invasion and ursurpation of the jurisdiction of the States of New Jersey and New York. For the reason expressed we will not deal with that question either at this time.

Such findings of fact and conclusions of law as are necessary to our decision are expressed in this opinion.

The certificate granted by the Commission in Finance Docket No. 18781, dated May 15, 1957, is in excess of the statutory powers of the Commission and will be set aside and for nothing holden. Proposed decree to be submitted.

Appendix C

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 19247 [1]

ERIE RAILROAD COMPANY FERRY ABANDONMENT

Decided June 26, 1957

Certificate issued permitting abandonment by the Erie Railroad Company of its passenger ferry line across the Hudson River between Jersey City, N. J., and Chambers Street, New York, N. Y., and abandonment of use under contract of the aforesaid ferry by the New York, Susquehanna & Western Railroad Company and the trustee of the New Jersey & New York Railroad Company. Conditions prescribed.

M. C. SMITH, JR., FREDERICK G. HOFFMANN, THOMAS D. CAINE, ROWLAND L. DAVIS, JR., LEON LEIGHTON, ANDREW M. CALAMARI, and RICHARD SWANN BUELL for applicants.

BENEDICT W. HARRINGTON, HENRY B. FREEFIELD, and CHARLES N. GERARD for the State of New Jersey Board of Public Utilities Commissioners.

CHARLES L. HANNELLY, JOSEPH HARRISON, HENRY B. MACFARLAND, JAMES N. MCTIGHE, EDWARD G. EVERTZ, IRVING C. EVERS, LEROY B. HUCKIN, NICHOLAS MARTINI, NATHAN BERNSTEIN, JESSE B. LESLIE, JR., CHARLES T. LARK, JR., FRANCIS CAMINETTI, JOHN H. SHIELDS, MARION BUZZELLE, EMIL M. WULSTER, GEORGE WINNE, ROBERT H. WALL,

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[1] This report also embraces Finance Docket No. 19351, New York, Susquehanna & Western Railroad Company Abandonment of Ferry Use, and Finance Docket No. 19374, New Jersey & New York Railroad Company, Trustee, Abandonment of Ferry Use.

Appendix C

ALEXANDER E. FASOLI, and WILLIAM C. LAYTON, JR., for counties, townships, municipalities, and citizens organizations in opposition.

WILLIAM G. MAHONEY, JAMES M. DAVIS, JR., and CHARLES J. SHERIDAN, JR., for railway labor organizations.

Report of the Interstate Commerce Commission

By the Commission:

Exceptions to the report proposed by the examiner were filed by protestants, and oral argument has been heard.

By application filed February 10, 1956, the Erie Railroad Company requested permission to abandon its passenger ferry line across the Hudson River between Jersey City, N. J., and Chambers Street in the Borough of Manhattan, city and county of New York, N. Y., Finance Docket No. 19247. By applications filed May 7, 1956, and May 21, 1956, the New York, Susquehanna and Western Railroad Company, and the trustee of The New Jersey and New York Railroad Company, respectively, requested permission to abandon their respective contractual use of the ferry line of the Erie Railroad Company, Finance Docket Nos. 19351 and 19374. The applicants, in the order named, are sometimes referred to herein as Erie, Susquehanna, and Jersey. Other carriers whose names are prominently mentioned herein are The Delaware, Lackawanna & Western Railroad Company and The Pennsylvania Railroad Company, referred to as the Lackawanna and the Pennsylvania, respectively. As used hereinafter, "New York" connotes the downtown and midtown areas of Manhattan. Protests were presented by individual users of the trains, who, under the proposals being considered, would continue to use the Jersey City terminal after a form of coordinated service, described hereinafter, is instituted. The New Jersey Board of Public Utility Commissioners, the county of Passaic, and several boroughs and communities in New Jersey appeared

in opposition. Several organizations of commuters were represented in opposition to portions of the plan, and various organizations of employees of the applicants appeared for limited purposes. As shown hereinbelow, hearings were held. Pursuant to petitions filed by Erie on November 13, 1956, and April 22, 1957, to which no replies were filed, we heard oral argument and the proceedings were submitted for our consideration and initial decision.

The application in Finance Docket No. 19247, so far as it involves Erie's terminal facilities at Jersey City, is related to an application filed by the Erie on December 20, 1955, and by amendment joined in as party-applicant by the Lackawanna, Finance Docket No. 19182; and an application filed March 12, 1956, by the Jersey Finance Docket No. 19288. Together, the three applications constitute a plan to coordinate the passenger-terminal facilities of the Erie and the Lackawanna on the New Jersey side of the Hudson River. The plan contemplated certain construction of connecting lines and granting and acquiring of trackage rights by the applicants. When fully operative, most of Erie's and all of Jersey's passenger trains which theretofore had operated to Erie's Jersey City terminal and station would be diverted to Lackawanna's facilities at Hoboken, and the ferry service of the latter between Hoboken and Barclay Street in New York would be used to accommodate the passengers of both carriers. In effecting the change-over, the present fares and charges paid by the Erie and the Jersey passengers will be maintained. Protests were received and the applications were heard April 23-26, 1956, on a consolidated record.

By order of June 1, 1956, division 4 reopened and assigned the proceeding in Finance Docket No. 19247 for further hearing, and ordered heard therewith the applications of the Susquehanna and the Jersey, Finance Dockets Nos. 19351 and 19374. A consolidated and further hearing was held July 23 and 24, 1956. Pursuant to a petition filed by

Erie and the Lackawanna, the division on August 27, 1956, entered its report, certificate, and order approving and authorizing the trackage rights and construction projects described in Finance Dockets Nos. 19182 and 19288, *Erie R. Co., Trackage Rights*, 295 I.C.C. 303. The necessary construction has been completed, and with the exception of three branchline trains in each direction on week days, all Erie passenger trains presently operate to and from the Lackawanna terminal. Erie's ferry continues to operate to and from Jersey City on a reduced schedule.

The need for Susquehanna and Jersey to file applications to abandon their respective contractual use of Erie's ferry was questioned on the grounds that Erie's application would be construed as embracing the applications of the other carriers to abandon use of the ferry service. Both later applications were filed with the reservation that they be dismissed if not required. Susquehanna and the Jersey, among other things, showed that their financial conditions would not permit them to institute and operate ferry service. On brief, counsel for Jersey cites the United States Supreme Court in *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, as determining that an application to abandon a line of railroad may be filed by any party in interest, and on that basis contended that the Susquehanna and the Jersey need not have filed individual applications to abandon use of Erie's ferry. Of course, Erie had a right to request authorization for the Susquehanna and the Jersey to abandon their use of Erie's ferry but did not do so. Therefore, when the public was notified that Erie desired to abandon its Jersey City-Chambers Street ferry, as required in our regulations pertaining to applications for permission to abandon lines of railroad and operation thereof,[2] no reference was made to the position of Susque-

[2] Order of division 4, dated November 27, 1941, Budget Bureau No. 60-RO41-42.

hanna and Jersey as to abandonment of the use of the ferry. The subsequent filing of the applications by the user carriers, and compliance with the applicable regulations and procedures, served to rectify the lack of notice to the public and presented a method of lawfully considering the proposed abandonment of the ferry use.

Erie's passenger terminal, station, and other facilities at Jersey City are used for the handling of trains having passengers arriving at or departing from New York via ferry. Such facilities served Erie's main-line trains, those of Jersey and the Susquehanna under trackage rights, and Erie's Greenwood Lake, Weehawken, and Northern branch lines, each of which provides commuter service between New York and suburban points in northern New Jersey and Rockland County, N. Y. In New York, Erie's Terminal at Chambers Street is about 1,000 feet, or 4 city blocks, north of Lackawanna's Barclay Street terminal. On the New Jersey side of the river, Erie's terminal is about 3,000 feet south of Lackawanna's Hoboken terminal.

Passenger trains traveling inland from the Jersey City terminal traverse the so-called Bergen Archways which is an open cut with 4 passenger tracks about 0.75 mile in length, over which there are a series of road crossings. Immediately east of the archways, Erie's Weehawken branch to the north connects with the tracks reaching Jersey City. Almost immediately west of the archways, and east of Croxton where Erie has interchange-yard facilities, the main-line tracks of Erie cross those of Lackawanna leading to the Hoboken terminal. At Croxton, Erie's Northern branch diverges almost due north; other lines extend westward about 1,000 feet where the main line of Erie, over which Jersey's trains also operate, diverges slightly westerly of north, and the Greenwood Lake branch parallels Erie's nearby main line about 2,000 feet, then proceeds almost due west. From the point of crossing near Croxton Lackawanna's tracks (leading away from Hobo-

ken) extend northwesterly about 1,000 feet from which point its Boonton branch goes almost northwesterly (between Erie's main line and Greenwood Lake branch), and its Morris and Essex branch continues almost due west. Eastwardly from the Croxton crossing, Lackawanna's tracks enter a tunnel, the westerly end of which is at an elevation approximately 21 feet above the westerly end of the Bergen Archways, and the easterly end of which is about 2,000 feet northeasterly of the east end of the archways, thence the tracks proceed to the Hoboken terminal. Erie's Weehawken branch crosses Lackawanna's tracks near the easterly end of the latter's tunnel.

In addition to the Erie and the Jersey passenger trains moving to and from the main and branch lines described hereinabove, the Jersey City terminal and station facilities and Erie's ferry accommodate passengers of the trains of the Susquehanna. The latter's passenger lines extend from a connection with Erie's Northern branch tracks about 2,000 feet north of Croxton to Butler, N. J., northwardly and westwardly about 36.9 miles from Jersey City. South of the Susquehanna-Erie connection, a freight line of Susquehanna connects with a line of Pennsylvania, which, in turn, continues generally south by a viaduct which crosses Erie's tracks to Marion Junction, N. J., on Pennsylvania's main line. The connection is used solely for the interchange of freight traffic between the Susquehanna and the Pennsylvania.

By the report and order in Finance Dockets Nos. 19182 and 19288, mentioned previously herein, Erie and the Lackawanna were authorized to construct three lines of railroad connecting their respective tracks, and Erie and the Jersey were authorized to acquire trackage rights over the present and new trackage of the Lackawanna and the Erie, including joint use of Lackawanna's Hoboken terminal and station, its ferry service across the Hudson River, and the ferry station in New York at Barclay Street. Since com-

pletion of the construction, Erie's main line and its Greenwood Lake branch connect directly with Lackawanna's tracks to the terminal at Hoboken. However, because of the location of certain bridges and other facilities, it is not practical from an engineering viewpoint to construct a direct connection between Lackawanna's line and the Susquehanna-Northern branch line.

Under the coordination plan as partially implemented, the trains of Susquehanna and the Northern branch continue to be operated into and out of the Jersey City station. Sufficient tracks, platforms, public convenience facilities, and incidental services are provided at Erie's terminal to accommodate all passengers of the trains that presently, and in the future will continue to utilize that terminal. To do otherwise would require an arrangement whereby Susquehanna and the Northern branch trains to Hoboken would be routed over the Erie trackage presently used by those trains to a point east of Croxton, backing onto Erie's main line about 1.2 miles in opposition to the predominant flow of traffic, to the new connection with Lackawanna's Boonton branch near Erie's milepost 3.17, thence proceeding to the Hoboken terminal. A corresponding backup against the flow of traffic would be involved in the reverse direction. That route would avoid the continuance of operations into the Erie terminal and would take advantage of the most favorable conditions as to grade crossings, switches and connections, and involve passenger trackage only.

On the basis of test runs over existing trackage best suited to simulate the backup required to reach the Lackawanna tracks and terminal, Erie's engineers estimate that the required shuffling of the Susquehanna and the Northern branch trains would require the addition of 10 minutes to the present eastbound schedules and 8 minutes' extra time westbound. The estimate reflects the additional time needed to complete the run plus an allowance of about 2 minutes to avoid undue interference with the operation of the other

Erie trains and those of the Jersey and the Lackawanna, the proposed schedules of which also might require adjusting if the backup move is instituted.

As a consequence of the coordination, the contract between the Erie and the Susquehanna, under which the latter's railroad passengers use Erie's ferry service, will be adjusted to reflect a reduction in rental payments for the facilities and services which Erie furnishes. Inasmuch as the present agreement does not allocate specific charges for the separate rights involved, the amount of any reduction of the contract rate will be a matter of negotiation between the parties. If and when the present terms and conditions are altered, the parties must decide whether to file an appropriate application for our approval.

Counsel for a railway labor organization, with the concurrence of counsel representing the New Jersey commission and organizations of commuters presently using Susquehanna and the Northern branch trains, attempted to develop as feasible other connecting routes which would deliver the trains of those carriers into the Hoboken terminal, or, in lieu thereof, into a Pennsylvania passenger terminal near Marion Junction. Each of these suggested routes would be inherently cumbersome, more time consuming, and impracticable as one or more of the following requirements would be involved: Use of freight trackage for passengers trains; use of a single-tracked tunnel having restricted speed limits; crossing an important street at grade at a point where all trains are required to stop before proceeding; connection of tracks at different elevations in a manner that would not be conducive to safe and comfortable operations; or the use of trackage, viaduct, and terminal facilities of Pennsylvania even though there is no intimation that the right would be granted at a reasonable charge. In each case, service to the public over the suggested route would be poorer than could be provided over the route first described hereinabove.

Appendix C

During the years 1953, 1954, and the first 9 months of 1955, in order, operation of the ferry resulted in net annual deficits of $1,247,652, $1,000,912, and $721,433.

Erie estimates that of the $3,254,588 decrease in annual operating losses[3] related to its New Jersey-New York passenger business, which can be realized under the coordination plan as contemplated by Erie and the Lackawanna, a total of $1,083,088 would pertain directly to the proposal to abandon the Chambers Street Ferry. The resulting savings in labor costs, materials, and supplies are shown as follows (cents omitted): Wages of station employees engaged in operation of the ferries $91,323, station supplies and expenses $1,797, police department $13,181, ferry-boat operation $648,192, ferry-boat maintenance $201,200, Chambers Street ferry-house rental $59,961, and building-and-structure maintenance at Jersey City where ferry facilities would be eliminated $67,433. The foregoing totals are based upon the assumption that Northern branch and the Susquehanna trains would continue to use the Jersey City terminal. Even if downward adjustments of some of the items would be reasonable, the total economies to be realized as a result of the ferry service being abandoned would be approximately $1 million a year.

The ferry facilities at Jersey City consist of 3 ferry bridges and 3 slips, and a passageway connecting with the street. The Chambers Street station, which is rented from the city of New York, has 2 ferry slips and a connecting bridge used for trying the vessels and handling the passengers and vehicles. Erie uses 3 ferry vessels in its scheduled service and has another in standby service. Of the ferry-boats now being used, the ARLINGTON and the JAMESTOWN were built in 1905 and 1908, respectively, the YOUNGSTOWN

[3] Details explained in *Erie R. Co. Trackage Rights, supra*, decided August 27, 1956.

was built in 1922, and the MEADVILLE in 1936. Their carrying capacity ranges from 2,033 to 2,203 passengers when no vehicles are carried, from 1,577 to 1,729 passengers when vehicles also are on board. They can accommodate from 20- to 26-passenger vehicles or from 15- to 18-passenger cars and trucks. Each is powered with steam engines ranging from 1,200 to 1,500-horsepower. The annual cost of ordinary maintenance of the ferryboats is about $50,000 each. In addition, the ARLINGTON and the JAMESTOWN will need hull and steel-plate work at a cost of $20,000 each, and their boilers will require renewal, within 2 to 5 years, at a cost of $102,000 each. Upon discontinuance of the ferry service by Erie, the MEADVILLE and the YOUNGSTOWN will be sold to Lackawanna at their salvage value of $37,250 and $18,650, respectively. The others will be tied up. Based on a sale made in 1954, the salvage value of the ferries is estimated to be about $18,000, and the cost of recovering the scrap about $6,000.

Physically, the facilities of Lackawanna's railroad and ferry terminal and stations are larger, more complete and convenient, more modern, and in better repair than Erie's. The record shows that they have ample capacity to handle additional trains, ferry-boats, and passengers. Lackawanna's ferry vessels and handling facilities are such that the main deck and the upper deck are loaded and unloaded at the same time from separate levels. The Hoboken ferry station has 6 ferry bridges and 6 slips, 2 of which are used only for the mooring of ferryboats, 1 for emergency service, and 3 for the regular morning and evening commuter rush periods. The ferryboat fleet of Lackawanna consists of 4 vessels used in regular service and 1 in standby service. Four of the vessels, built in 1905 and 1906, are powered by steam engines, and the other, rebuilt in 1949, has been converted to diesel-electric power. The vessels carry from 1,875 to 1,957 passengers with no vehicles aboard, and gen-

erally are similar to Erie's vessels. The ferry boat facilities of Lackawanna are able simultaneously to unload the arriving passengers and load for the outbound trip, completing the operation within 3 or 4 minutes. On reviewing the record and considering the recent experience in handling the combined passenger load of the Lackawanna, Erie, and Jersey trains, we find that the Hoboken terminal facilities, the ferry terminal at Barclay Street, and the ferryboats which are operated by Lackawanna are adequate to handle all the trains and passengers involved in the coordination herein.

In connection with the proposed ferry schedule, an experienced ferryboat captain employed by Erie related that on trips during the heaviest part of the commuter rush hours, Erie's vessels sometimes are filled to capacity and some persons are required to wait for the next ferryboat; and that ferryboat users generally refrain from riding the ferries during cold and inclement weather. The captain expressed an opinion that, if the ferryboat schedules of Erie and the Lackawanna were consolidated, despite the elimination of many trips by Erie's boats, conditions of navigational hazards and impaired safety would result. The examiner sustained objections against this testimony as involving regulations of matters not included in the Interstate Commerce Act. The ruling of the examiner is sustained.

Adjacent to and connecting with the stations and terminals at Jersey City and Hoboken are train facilities of the Hudson & Manhattan Railroad Company, referred to herein as Hudson. This railroad operates electric trains to New York through a tube over a downtown route to the Hudson Terminal, about 3 blocks south of Barclay Street, and a second tube which terminates at a station adjacent to Pennsylvania's 33d Street station, and several stations between downtown and 33d Street. Hudson's terminals and stations

are below ground and are reached by stairways. Insofar as Hudson presently transports railroad passengers of the applicants to and from Hudson Terminal, its trains from Hoboken travel 0.88 mile in a southerly direction to Erie's station, 0.83 mile to the Exchange Place station of Pennsylvania (in Jersey City), thence 1.25 miles through the tube, a total distance of 2.96 miles, operating on 10-minute schedules. Approximately midway between Hudson's Hoboken and Erie terminal stations, the second tube route diverges eastward as a "wye" and crosses under the river. From Hoboken the distance to 33d Street is 3.5 miles, generally traversed in 14 minutes, and from the Erie station to 33d Street the distance is 3.4 miles, traversed in 13 minutes. The prevailing fares on Hudson's trains are 20 cents each way across the river and 10 cents between certain stations within New Jersey, including station in or near Jersey City west of Exchange Place.

In addition to the ferry service to New York by Erie and the Lackawanna and the tube-train service of Hudson, train passengers at Lackawanna's station may choose to use bus service presently provided by a public carrier which has a line that terminates outside the Hoboken station. At a station in North Bergen, N. J., known as "Susquehanna Transfer", about 5 miles north of Jersey City, passengers of Susquehanna trains and some Northern branch trains are able to connect with a direct bus line to the Port Authority Bus Terminal in midtown New York. Since 1939, the service has been provided exclusively for railroad passengers under a contract between Susquehanna and the bus company. The scheduled time for the bus trip is 13 minutes, but, because of a temporary condition of congestion at the Lincoln Tunnel, it is conceded that the trips require somewhat longer periods. In addition to the railroad fare, passengers using buses at Susquehanna Transfer pay an additional fare of 20 cents in each direction. The average

daily number of Susquehanna's train passengers who used the Susquehanna bus-transfer service during the week January 17-21, 1955, was 431 eastbound and 429 westbound, and during the week June 25-29, 1956, was 381 eastbound and 424 westbound. The bus company has equipment available to furnish additional schedules to accommodate any new passengers desiring to use the bus connection, in the event the ferry service of Erie is discontinued.

Prior to the changeover in Erie's service under the coordination plan, the number of trains of the main line and branch lines of Erie, including the Northern branch, Jersey, and Susquehanna, and the total number of passengers arriving at and departing from the Jersey City station, based on actual counts made during the week-days of January 18-24, 1956, average 81 daily trains eastbound with 19,304 passengers, and 81 trains westbound with 18,507 passengers. Of those, there were 11 Susquehanna and Northern branch trains in each direction which handled 2,430 passengers eastbound and 2,178 passengers westbound. Corresponding totals on Saturday, January 21, show 38 trains into Jersey City eastbound with 2,920 passengers and 40 trains westbound with 2,984 passengers, of which there were 4 Northern branch and Susquehanna trains with 108 passengers eastbound and 3 trains with 50 passengers westbound. On Sunday, January 22, 1956, there were 21 Erie and Jersey trains with 2,156 passengers eastbound and 22 trains with 1,597 passengers westbound. There were no Sunday trains of Northern branch of Susquehanna.

Counts made on the same dates show that the ferry trips, most of which meet the trains at Jersey City, operated 66 daily schedules eastbound with a total passenger load of 9,580, and 68 trips westbound with 8,154 passengers. The total trips on the Saturday were 33 eastbound with 1,120 passengers, and 34 westbound with 1,113 passengers. The Sunday totals were 23 trips with 799 passengers eastbound,

and 23 trips with 682 passengers westbound. On holidays, 28 eastbound and 29 westbound trips are operated. The ferry passenger totals include persons who use trains of Erie, Jersey, and Susquehanna, plus an average of 34 eastbound and 73 westbound passengers each weekday who do not ride trains before or after the ferry trip. The number of passengers (including railroad and local or nonrailroad passengers) on the Chambers Street ferry annually decreased from more than 15.2 million in 1930 to 5.8 million in 1955. Between 1939 and 1955 the largest number of passengers in any year was 6.8 million (1950), and the least was 5.9 million (1940), while between 1931 and 1938 the total passengers decreased from 14.0 million to 8.9 million. The number of vehicles ferried by Erie to and from Chambers Street in a year (stated in millions) varied from 0.2 in 1930 to 0.7 in 1933; from 1.0 in 1934 to 1.2 in 1941; from 1.0 in 1942 to 0.5 in 1952; and from 0.3 in 1953 to 0.2 in 1955.

The foregoing statements presented by Erie's witnesses regarding the trains and passengers of Susquehanna, who would not be able to use Lackawanna's terminal under the coordination plan, are slightly higher than the totals presented by Susquehanna's witnesses who conducted actual passenger counts during the weeks beginning Monday, January 17, 1955, and Monday, June 25, 1956. Susquehanna also showed that of the passengers on its trains having the greatest number of commuters (using as a sample 3 trains in each direction on Wednesday, February 15, 1956, and 2 trains in each direction the following Wednesday, and combining the totals) 801 of 1,325 passengers eastbound, or 60.4 percent, and 711 of 1,117 passengers west bound, or 63.6 percent, also used Erie's ferry to and from New York. So far as the witnesses could determine, the remaining Susquehanna passengers used Hudson's tube trains beyond Jersey City.

Appendix C

The tracks and platforms of the railroad trains at Erie's Jersey City terminal, and those of the adjacent station of Hudson are at different elevations. They are connected by several concourses and a passageway which extends an overall distance of about 1,000 feet. The shortest walking distance between the 2 sets of tracks is about 600 feet. At least 2 flights of stairs are between the level of the Erie tracks and the Hudson tracks. As part of a ramp at one of the concourses, Hudson owns and operates a moving-sidewalk device which carries persons upgrade for a distance of about 275 feet. The estimated average walking time from the Erie facilities to the Hudson trackage is about 6 minutes. In service, Hudson operated 191 passenger cars, 75 of which were built in 1921, and the others in 1908, 1910, and 1917. At present there are 30 cars available to add to the rush-hour trains, if needed. There are seats for 44 persons on each car, but with standees the cars accommodate 140 passengers. The present average number of passengers in Hudson's cars is between 90 and 100 each.

Hudson publishes no timetables, but operates according to a "running schedule" which indicates times of arriving and departing from each terminal and station. Under the Monday-through-Friday schedules as of the date of the hearing, 16 trains leave the Hoboken station, stop at the Erie station, and terminate at Hudson Terminal between 8:04 a.m. and 9:18 a.m., and 19 trains leave Hudson Terminal, stop at the Erie station, and terminate at the Hoboken station between 5:03 p.m. and 6:29 p.m. Over its other route are operated 18 trains which originate at Journal Square, stop at the Erie station, and terminate at 33d Street between 8:06 a.m. and 9:16 a.m., and 21 schedules operate in the reverse direction and arrive at Journal Square between 5:06 p.m. and 6:32 p.m. In addition, 16 trains during the morning rush hours and 22 trains in the evening rush operate between the Hoboken station and 33d

Street. During rush hours 6-car trains are operated, and between most trains 4-minute headways are maintained. During other hours of the day headways vary from 4 to 15 minutes. On normal weekdays Hudson's trains average about 2,114 passengers from the Hoboken station and about 3,121 passengers from the Erie station to Hudson Terminal during the morning rush period, and 4,560 passengers from the Hoboken station and 2,606 passengers from the Erie station to 33d Street.

Studies of the capacity of Hudson's station and train facilities show that every passenger now using Hudson's trains from and to the Erie station could readily be handled at Hudson's Hoboken station along with the passengers now regularly using that station. This can be achieved with little or no extra delay or inconvenience. However, if it is found to be necessary, Hudson plans to alter the layout of its terminal concourses, track platforms, and pay turnstiles to accommodate a heavier flow of traffic. Additional passenger capacity, if needed, can be supplied by adding 1 car to each of its 6-car trains, or, as an alternative, by reducing the present minimum headway from 4 minutes to 3 minutes. As evidence that Hudson's physical plant is adequate to handle considerable additional traffic, an official of the company asserted that in 1927 Hudson handled about 35 million Erie and Susquehanna passengers beyond their respective terminals, compared to about 3 million passengers annually who presently use also the trains of Erie, Jersey, and Susquehanna.

Individually, and through organizations created for that purpose, passengers of Northern branch and Susquehanna trains oppose the loss of ferry service at Jersey City, which would leave the Hudson tube-train service as the only means of traveling between the Jersey City terminal and New York. The governing bodies and civic groups of county and municipal organizations support this position. Generally, the contentions are that ferry service is pre-

ferred because it is less congested, more comfortable, quieter, and less costly than Hudson's service. Some individuals point to the greater convenience of the ferry for persons physically unable to engage in lengthy walks and climbing many stairs. Those persons desire the "ground level" ferry service to continue as a means of commuting without being subjected to congestion which, they state, characterizes available bus service as well as the tube trains. Many protestants desire to continue the use of the Chambers Street station in New York in order to avoid having to travel greater distances within New York before and after crossing the river. Despite these sentiments, and charges that neither the tube-train schedules nor bus schedules are reliably maintained, the protestants concede that those services and other public and private means of trans-Hudson River travel are used regularly by numerous persons.

A real-estate broker at Maywood, 15 miles north of Jersey City on the Susquehanna line, advertises the convenience of Susquehanna's railroad service for commutation to New York. He predicts that the loss of ferry service would impair the sale of real estate in Maywood and adversely affect property values. Nevertheless, if the ferry is abandoned, he will continue to advertise that Maywood has convenient commuter service available. Evidence of record indicates that use of the ferry does not necessarily involve less time than other methods of commutation. That conception is supported only by persons who would use bus service to and from New York and require supplemental transportation to reach the area near the ferry terminal. In view of Hudson's service being available at Jersey City where Susquehanna's trains will continue to terminate, and at Hudson Terminal which is reasonably close to Chambers Street, the proposition of undue delays is not tenable. In fact, the time involved in using the train-ferry service can be reduced in many instances.

Appendix C

Erie and the Railway Labor Executives' Association (on behalf of its affiliated organizations including the Brotherhood of Railroad Trainmen), by a stipulation dated May 24, 1956, agreed that each would accept the imposition of conditions for the protection of employees affected by the coordination proposals. The stipulation specifies conditions the same as those prescribed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271. The record shows that a total of 505 positions of all classes, including personnel engaged in operation of the ferries, will be eliminated when the coordination is fully consummated. Conditions the same as those indicated in the stipulation will be imposed for the protection of any railway employee adversely affected because of the changes proposed in the proceedings under consideration, including the previously authorized construction and trackage-rights proposals.

Determination of the issues herein is on the basis of simple uncontroverted facts, briefly summarized as follows: Daily totals of 140 trains and approximately 33,203 persons (counting each one-way rider as a separate person) who rides Erie's and Jersey's trains and Erie's ferry will not be affected by the proposals under consideration, and no objection has been presented on their behalf. A total of 22 Northern branch and Susquehanna trains and about 4,608 persons, who also ride Erie's ferries, will be deprived of the present ferry service, but those persons have available the tube-train service of Hudson and bus service to and from New York by making connection at Susquehanna Transfer. The facilities of Hudson and the bus operator can be augmented without difficulty to provide adequate service for all persons possibly affected by the proposed ferry abandonment. The commuters who are required to change their present riding methods face increased costs of about $7 per month. On the other hand, the abandonment of the ferries and their use by Susquehanna and the Jersey will permit Erie to realize annual savings of about

$1 million. In addition to the savings to Erie, the Lackawanna also will benefit by being able to reduce its present passenger-operation out-of-pocket losses.

During the course of the hearings and argument herein, the protestants contended that their opposition was justified in terms of public convenience and necessity. They cited various elements of hardship upon the users of the applicant's services if the ferry is abandoned. The more basic of these contentions have been discussed hereinabove in light of other facts bearing upon particular issues. In part, other arguments concern the relative freedom from congestion afforded by the ferries which seldom are filled to capacity; greater distances necessary to travel to reach the stations of other railroads and bus lines on the New Jersey end of the trip, and in New York if service is discontinued at Chambers Street; the effect of overcrowded streets, highways, and motor-vehicle tunnels and bridges upon bus-carrier operations; need for the ferries for civil defense purposes in the event of enemy attack or disaster; decrease in the value of homes of residents required to use less favorable substitute commuter service; loss of time in connection with Hudson or bus service; failure of applicants to induce more patronage by advertising and making modern facilities available; and the fact that general system operations of Erie have produced profits and regular dividend payments to stockholders regardless of the out-of-pocket losses attributable to the ferry operation. Similar contentions, separately and in combination, have been discussed and considered in practically every previous proceeding involving railroad ferry abandonments and in each instance were held not to be of controlling importance. See *New York Central R. Co. Ferry Abandonment,* 295 I.C.C. 285, affirmed May 15, 1957, 295 I.C.C. ——, and cases cited therein. Because none of the passengers now using Erie's ferry service would be left without adequate river-

crossing service under the foregoing proposals, the factors relating to hardships upon the ferry riders, in our opinion, are of insufficient merit to control the decision herein.

Contentions and requested findings presented by the protestants at hearing, on exceptions, and at oral argument, which are not discussed herein and are not reflected in our conclusions, have been given consideration and found without material significance, or otherwise not justified.

Subject to the imposition of the conditions mentioned to protect carrier employees, we find that the present and future public convenience and necessity permit abandonment by the Erie Railroad Company of its passenger ferry line across the Hudson River between Jersey City, N. J., and Chambers Street, New York, N. Y., and abandonment of use under contract of the aforesaid ferry by the New York, Susquehanna and Western Railroad Company, and the trustee of The New Jersey and New York Railroad Company, described hereinabove. An appropriate certificate will be issued, effective from and after 30 days from its date, in which suitable provision will be made for the cancellation of tariffs, the submission of journal entries, and compliance with valuation order No. 24.

Commissioners Hutchinson and McPherson did not participate in the disposition of this proceeding.

Commissioner Walrath, being necessarily absent, did not participate in the disposition of this proceeding.

Appendix D

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 19247[1]

ERIE RAILROAD COMPANY FERRY ABANDONMENT

Decided August 14, 1957

Upon reconsideration:

1. Prior report, 295 I. C. C. ———, decided June 26, 1957, issuing certificate permitting abandonment by the Erie Railroad Company of its passenger ferry line across the Hudson River between Jersey City, N. J., and Chambers Street, New York, N. Y., and abandonment of use under contract of the aforesaid ferry by the New York, Susquehanna & Western Railroad Company and the trustee of the New Jersey & New York Railroad Company, subject to conditions prescribed, affirmed as to jurisdiction.

2. Petition of the protestants, except insofar as they seek reconsideration, denied.

Appearances as shown in previous report, and GROVER C. RICHMAN, JR., and FELIX G. FORLENZA for the State of New Jersey and the Board of Public Utility Commissioners of the State of New Jersey.

---

[1] This report also embraces Finance Docket No. 19351, New York Susquehanna & Western Railroad Company Abandonment of Ferry Use, and Finance Docket No. 19374, New Jersey & New York Railroad Company, Trustee, Abandonment of Ferry Use.

Appendix D

Report of the Commission on Reconsideration

By the Commission:

By report and certificate in this proceeding, dated June 26, 1957, 295 I. C. C. ———, the entire Commission, subject to appropriate conditions for the protection of adversely affected carrier employees, permitted abandonment by the Erie Railroad Company of its passenger ferry line across the Hudson River between Jersey City, N. J., and Chambers Street, New York, N. Y., and abandonment of use under contract of the aforementioned ferry by the New York, Susquehanna & Western Railroad Company, and the trustee of The New Jersey & New York Railroad Company. On July 31, 1957 a petition was filed on behalf of the State of New Jersey and the Board of Public Utility Commissioners of the State of New Jersey for reconsideration of the report and certificate of June 26, 1957, on the issue of jurisdiction as well as modification of the effective date of the certificate. Physically attached thereto was a copy of a petition dated July 29, 1957 filed by the State of New Jersey before the above-mentioned Board requesting that Board to issue an order directed to Erie Railroad Company and the New York, Susquehanna and Western Railroad Company to show cause why public convenience and necessity do not require a continuance of the service between Jersey City, N. J., and Chambers Street, New York, on or after August 15, 1957, and praying that the Board issue an order directing the above-named railroads to continue operation and use of the ferry on and after August 15, 1957, pending a final determination by the Board, the applicant Erie Railroad Company, hereinafter sometimes referred to as Erie, replied to the petition.

The sole point raised by the petitioners in their request for reconsideration is that our jurisdiction does not extend to the abandonment of the Erie's passenger ferry. They state that a request for dismissal on that ground had been

made in their exceptions to the examiner's proposed report, that they had expected us to make a specific ruling on the issue of jurisdiction, and that we are *a fortiori* required to make jurisdictional findings in a case where our jurisdiction is questioned. The petitioners then request that we reconsider the jurisdictional exception to the examiner's proposed report, and dismiss the application in Finance Docket No. 19247 for want of jurisdiction. In our report of June 26, 1957, we stated:

> "Contentions and requested findings presented by the protestants at hearing, on exceptions, and at oral argument, which are not discussed herein and are not reflected in our conclusions, have been given consideration and found without material significance, *or otherwise not justified*". (Italics supplied.)

The protestants assert that the above-quoted statement must be assumed to apply to the jurisdictional issue, among the other contentions so disposed of, since no specific reference to the jurisdictional issue appears elsewhere in our report. However, they argue that the finding in this respect should have been more specific. Whether or not the necessary finding was made we believe it desirable that our views be stated more clearly.

A similar jurisdictional issue was presented in Finance Docket No. 18781, *New York Central Railroad Company Ferry Abandonment*, 295 I. C. C. 385, decided September 27, 1956, which we affirmed in our report on reconsideration, decided May 15, 1957, 295 I. C. C. ———. There, as in the present proceeding, the same petitioners contended that we were without jurisdiction to consider requests to abandon a "ferry", or to permit abandonment of only passenger operations if the applicant also transported freight between the same points and would continue to do so after abandonment of the ferry. In the New York Central case

we found no error in the decision of the division overruling the motions to dismiss the application for want of jurisdiction. The record herein supports the conclusion that the equivalent of the situation there exists here. As was stated in that proceeding:

"Section 1(18) of the Interstate Commerce Act provides in part, that no carrier by railroad subject to part I of the act shall abandon all or any portion of the line of railroad, or operation thereof, unless there shall first have been obtained from us a certificate that public convenience and necessity permit such abandonment. The term 'railroad' as used in part I includes 'ferries used by or operated in connection with any railroad.' Since the record is clear that the facilities of the ferry herein are utilized in the transportation of passengers on through rail tickets, the fact that the *res* involved in this proceeding is a ferry line rather than a segment of railroad trackage does not affect our jurisdiction. * * *

"Our jurisdiction also is questioned on the theory that because the applicant proposes to discontinue only its passengers ferry service between Weehawken and New York City, while it intends to continue to transport freight, mail, and express between the same cities by other means and over different routes there will be no 'abandonment of a line of railroad' within the meaning of section 1(18). However, in reply to a question at oral argument, counsel for the protestants conceded that the jurisdiction of this Commission would be beyond doubt if the applicant proposed to abandon a line of railroad over which all carrier service would be terminated. The record supports the conclusion that the equivalent of this situation exists here and that abandonment of the ferry and discontinuance of all service thereover, cannot lawfully be effectuated

unless our jurisdiction is invoked by an application properly filed, and until we exercise our statutory powers in that regard."

The record clearly shows that the ferry terminals, vessels and other passenger facilities and services of Erie are maintained physically separate from the car float and lighterage equipment and other facilities used in the transporting freight across the Hudson River and that the routes of the water freight service are entirely different from the route of Erie's Chamber Street ferry line. The ferry service and the lighterage service is therefore analogous to two extensions of lines of railroad, one of which is used exclusively to transport passengers and the other used exclusively to transport freight. Abandonment of all passenger operations over the extension used exclusively in transporting passengers in such circumstances amounts to a complete abandonment of a line of railroad for which our authorization is required under section 1(18). See *New York Central Ferry Abandonment,* 295 I. C. C. 385 (388-391).

Accordingly we find that we have jurisdiction to grant the certificates sought in these proceedings and the request for dismissal will be denied.

The protestants have also requested a modification of the certificate which would postpone the effective date 150 days after June 26, 1957 in lieu of the present provision that the certificate shall become effective 50 days after that date. Their request is based on the aforementioned petition of July 29, 1957 initiated by the Attorney General of New Jersey before the State Board and in contemplation of the protestants' appeal from our decision to the Federal District Court.

We feel that the period presently provided is sufficient. Of course, an application for a stay of the effective date

may be made before a special three-judge U. S. District Court. Since Congress has acted to impose controls on the abandonment of lines of railroad, including ferries operated in connection therewith, and our jurisdiction thereunder is exclusive and plenary, we do not deem the pendency of the State proceeding an adequate reason for further delay in making effective the certificate issued herein. As we pointed out in the previous report "none of the passengers now using Erie's ferry service would be left without adequate river-crossing service." Postponement of the effective date of the certificate would be contrary to the public interest. Therefore we further conclude that no showing has been made to warrant modification of the effective date of the certificate of June 26, 1957.

On reconsideration of the record herein, and the contentions and arguments of the protestants, we sustain the findings of fact and conclusions set forth in the report of June 26, 1957, and affirm the decision therein. An appropriate order will be entered granting the petition insofar as it seeks reconsideration of the jurisdictional issue and denying it in all other respects.

Commissioner McPherson not participating.

Commissioners Tuggle and Murphy were absent and did not participate.

Commissioner Hutchinson was necessarily absent and did not participate in this action.

Appendix E

Statute Involved

The following statutory provisions are involved in this case:

The National Transportation Policy [49 U. S. C., preceding §1] provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1 (1) and (2) [49 U. S. C. 1], provides:

> (1) That the provisions of this part shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by

water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States.

Section 1(3)(a) provides:

The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any

common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

Section 1(18) provides:

After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad

subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 1(19) provides:

The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate, the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Section 1(20) provides:

The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to

issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 1(22) provides:

The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or inter-urban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 802-57

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY and THE STATE OF NEW JERSEY,

Plaintiffs,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Plaintiff-Intervenors,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

ERIE RAILROAD COMPANY and NEW YORK SUSQUEHANNA & WESTERN RAILROAD COMPANY,

Defendant-Intervenors.

Permanent Injunction Order and Decree

The above entitled cause having come on to be heard on the 18th day of October, A.D. 1957, and all parties thereto having appeared by counsel, and the court having heard the pleadings, the evidence, the briefs and arguments of counsel, and upon due consideration thereof after having taken the cause under advisement and written opinion having been filed thereon on the 10th day of December, A.D., 1957, and it appearing to the court that the certificate

granted by the Interstate Commerce Commission of which complaint was made therein is in excess of the statutory powers of the said Commission and as a consequence that the plaintiffs and the several plaintiff-intervenors should be granted the relief prayed for in their complaint, it is, by this special three-judge court duly constituted, in unanimous decision:

ORDERED, ADJUDGED and DECREED, that the order and certificate issued by the said defendant Commission in Finance Docket Nos. 19247, 19351 and 19374 dated the 26th day of June, A.D., 1957, is hereby set aside and for nothing holden: and that the preliminary injunction heretofore granted and issued by this court herein and entered in the office of the clerk of this court on the 14th day of August, A.D., 1957, be and the same hereby is made perpetual and permanent: and that the defendants, United States of America and Interstate Commerce Commission, an agency of the United States of America, and their officers, agents, servants, employees, attorneys, and all other of those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, including Erie Railroad Company and New York, Susquehanna and Western Railroad Company, defendant intervenors therein, be and they are hereby permanently and perpetually enjoined and restrained from continuing in effect or from permitting to become effective the aforesaid order and certificate of defendant Interstate Commerce Commission permitting abandonment or curtailment of the ferry service operated by the Erie Railroad Company across the Hudson River between Jersey City, New Jersey and Chambers Street, New York, New York, an abandonment of the use under contract of the aforesaid ferry by the New York, Susquehanna and Western Railroad Company, and all in accordance with the written opinion of the court as aforesaid.

Appendix F

IT IS FURTHER ORDERED, ADJUDGED and DECREED, that the defendant-intervenors, Erie Railroad Company and New York, Susquehanna & Western Railroad Company, pay the costs of these proceedings to be taxed by the clerk of this court.

Signed this 30th day of December, A.D. 1957.
By the Court

GERALD MCLAUGHLIN
Circuit Judge

WILLIAM F. SMITH
District Judge

REYNIER J. WORTENDYKE, JR.
District Judge

Entered this day of , A. D. 19

.....
Clerk

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MAY 9 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 47

ERIE RAILROAD COMPANY and NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,

Appellants,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

ERIE RAILROAD COMPANY

and

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY

Appellants,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

Motion to Affirm

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, the appellees, Board of Public Utility

Commissioners and State of New Jersey * move that the judgment of the District Court for the District of New Jersey be affirmed on the ground that the questions raised by the appellants are so unsubstantial as not to warrant further argument.

Statement of the Case

This is a direct appeal from a judgment of a statutory three-judge court entered December 31, 1957, pursuant to 28 U.S.C. 1253 which set aside permanently the enforcement of an order and certificate issued by the Commission in Finance Docket No. 19247, Erie Railroad Company Ferry Abandonment, Finance Docket No. 19351—New York, Susquehanna and Western Railroad Company Abandonment of Ferry Use; and Finance Docket No. 19374—New Jersey and New York Railroad Company, Trustee, Abandonment of Ferry Use, dated June 26, 1957. The permanent injunction order and decree was entered December 31, 1957. The order and certificate of the Commission purported to authorize the abandonment of Erie's passenger ferry line across the Hudson River between Jersey City, New Jersey and Chambers Street, New York City, New York and abandonment of use under contract of the aforesaid ferry by Susquehanna and the Trustee. The certificate was to have become effective from and after fifty days from its date to wit: August 15, 1957.

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* Throughout this Motion to Affirm we will refer to Erie Railroad Company as "Erie"; New York, Susquehanna & Western Railroad Company as "Susquehanna"; Interstate Commerce Commission as "Commission"; State of New Jersey as "State"; Board of Public Utility Commissioners of New Jersey as "Board"; Brotherhood of Locomotive Engineers as "Brotherhood"; United States Court for the District of New Jersey as "District Court"; Trustee for New Jersey and New York Railroad Company as "Trustee"; Delaware, Lackawanna & Western Railroad Company as "Lackawanna" and New York Central Railroad Company as "Central".

In its Report of August 14, 1957, denying Board and State's petition for modification the Commission based its decision upon the theory that the passenger ferries and service of Erie are maintained physically separate and apart from the carfloat and lighterage equipment and other facilities used in transporting freight across the Hudson River and that the routes of water freight service are different from the routes of the passenger ferry service. The Commission held that the passenger ferry and lighterage service

> "* * * is therefore analogous to two extensions of lines of railroad, one of which is used exclusively to transport passengers and the other exclusively to transport freight. Abandonment of all passenger operations over the extension used exclusively in transporting passengers in such circumstances amounts to a complete abandonment of a line of railroad for which our authorization is required under Section 1 (18). See *New York Central Ferry Abandonment,* 295 I.C.C. 385 (388-391)."

The Board of Public Utility Commissioners of the State of New Jersey and the State of New Jersey filed in the District Court a complaint seeking review of the order of the Commission. The Brotherhood intervened as Plaintiff and Erie and Susquehanna intervened as Defendants. The District Court held that the appellant Erie's passenger ferries and freight ferries, lighters and carfloats make up a portion of the appellant Erie's line of railroad between Jersey City, New Jersey and Chambers Street, New York City, New York. After considering pertinent decisions, including decisions of this Court and of the Commission itself with respect to partial discontinuances of operations over a line of railroad or a portion thereof, the District Court concluded that the certificate granted to the appel-

lants for abandonment of Erie's passenger ferries and use thereof by Susquehanna and Trustee without simultaneous abandonment of freight service was in excess of the statutory powers of the Commission and must be set aside.

The Court did not pass upon the other questions raised by Appellees, the Board and the State, which related to the merits of the case.

ARGUMENT

The decision of the District Court presents no question of substance warranting further argument in this Court.

It is well settled by decisions of this Court and of the Interstate Commerce Commission that the power of the Commission, under Section 1(18) of the Interstate Commerce Act, to authorize the abandonment of a portion of a line of railroad does not include the power to authorize partial discontinuance of service over a portion of a line of railroad.

The correctness of the District Court's conclusion that the rule established by these decisions is applicable to appellate Erie's passenger and freight service, as a portion of that appellant's line of railroad between Jersey City, New Jersey and Chambers Street, New York City, New York is clearly demonstrated in the District Court's opinion in this case and in its opinion in *Board of Public Utility Commissioners of the State of New Jersey et al.* vs. *United States of America et al.*—Civil Action No. CI-559-57, 158 Fed. Supp. 98, (New York Central-Weehawken Ferry Case).

The application of the abovementioned decisions to the passenger and freight ferry services operated by the appellant Erie and used by appellant Susquehanna across the Hudson River raises no question of national importance.

After considering applicable cases, the District Court reached a decision that was made with obvious care, full appreciation and application of the standards of review laid down by this Court.

I. Abandonment versus Partial Discontinuance of Service

The Commission cites as its sole authority for the issuance of the Order and Certificate of June 26, 1957, Section 1, Paragraph 18 of the Interstate Commerce Act. The said paragraph, as incorporated in 49 U.S.C. §1 (18), reads as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, *and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.* * * * " (Emphasis supplied).

The Interstate Commerce Commission is an administrative tribunal whose jurisdiction is founded upon the act creating it. This jurisdiction is defined by statute and the Commission may not attempt to exercise any jurisdiction not expressly conferred by statute or reasonably implied

therein. *Seatrain Lines* vs. *U. S. et al.*, (Del. 1946) 64 F. Supp. 156 aff'd (1947), 329 U. S. 424, 91 L. ed. 396, 67 S. Ct. 435.

The cases in which this Court has held that elimination of part of the service of a portion of a line of railroad does not fall within the meaning of the said paragraph, include the following, which were cited by the District Court in the *New York Central-Weehawken Ferry* case, *supra**, *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); and *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U. S. 341 (1951). The *Palmer* decision was cited by a three-judge District Court in *Banta* v. *United States*, 152 F. Supp. 59, 60 (D. N. J. 1957), in connection with the statement that "it was agreed between the parties that the Interstate Commerce Commission has no authority to allow a railroad to discontinue an individual interstate train." The judgment of the District Court, rejecting "the novel contention" that the Commission has such authority under a section of the Act other than Section 1, was affirmed by this Court in a *per curiam* opinion, Case No. 506, November 12, 1957, 355 U. S. 33, 34.

The first of the twelve decisions of the Interstate Commerce Commission to the same effect cited by the District Court in the *Central* case was issued in 1925, and may be regarded as involving "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315. The last of these decisions so cited was issued in 1954. The twelve de-

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* The District Court stated that the identical and decisive jurisdictional problem decided by that Court in the *Central* case appears in the *Erie* case, therefore the *Central* decision should be considered here as a related decision.

cisions reflect a well-considered and long-established administrative interpretation of Section 1(18) of the Act.

Regarding *Morris and Essex Railroad Co. Abandonment*, 175 I.C.C. 49, 52 (1931), one of the most striking of the decisions just mentioned, the District Court said "* * * the application asked for total abandonment, both freight and passenger, of a portion of a railroad line and of just the passenger service of the balance. * * * The Commission recognized its jurisdiction over the first part of the application but, holding [that] it had no authority over the second and that the latter was an essential constituent of the application, denied the entire request".

The four cases in which the Commission issued certificates, between the years 1941 and 1954, purporting to authorize abandonment of trans-Hudson passenger ferries operated by railroad companies which continue to operate trans-Hudson freight ferries, do not reflect a well-considered or long established administrative interpretation of Sections 1 (18-20) of the Act.

(a) The jurisdiction of the Commission was not challenged in any of those four cases.

(1) In *Central Railroad Company of New Jersey Trustees Ferry Abandonment*, 249 I.C.C. 269 (1941), the applicant sought authorization "to abandon a portion of its line of railroad consisting of a ferry between Jersey City, Hudson County, N. J., and West Twenty-third Street, New York, New York County, N. Y." No objection to the application was offered. The Commission, in its report, made no express finding of jurisdiction under Section 1 (18) of the Interstate Commerce Act. It noted that the operation of the railroad's remaining passenger ferry (the Liberty Street ferry) on a 24-hour basis would relieve to a large extent whatever inconvenience might be suffered by patrons of the line to Twenty-third Street.

(2) In *Erie Railroad Company Ferry Abandonment*, 252 I.C.C. 659 (1942), the applicant sought authorization "to abandon the Erie System ferry between Jersey City and West Twenty-third Street, New York City." The Commission's report contains the statement that the applicant's ferry service to New York City is performed by a pool of seven vessels and that the operation of the applicant's Chambers Street ferry is to be continued with an additional boat to be operated throughout the day. It contains no express finding of jurisdiction under Section 1 (18) of the Interstate Commerce Act.

(3) The third case, *Hoboken Ferry Company et al. Abandonment*, 257 I.C.C. 51 (1946) relates to one of the three passenger ferry operations that were operated by the Delaware, Lackawanna and Western Railroad Company, until 1946, between that company's Hoboken terminal and New York City: to Twenty-third Street, Christopher Street and Barclay Street, respectively. The ferry involved in this case ran to West Twenty-third Street. The Commission stated in its report that the Lackawanna was using, on its three "ferry line or routes", a pool of 13 vessels (24 hours a day to and from Twenty-third Street, 5 A.M. to 9 P.M. except Sundays to and from Christopher Street, and 5:30 A.M. to 12:30 A.M. daily to and from Barclay Street) and that, if abandonment of the Twenty-third Street ferry was permitted, the Lackawanna proposed to operate the Christopher Street ferry 24 hours [illegible] and place an additional boat in service on that route. The report does contain an express finding that the Twenty-third Street ferry was a line of railroad within the meaning of Section 1 (18) of the Act and that "the proposed abandonment" was subject to the jurisdiction of the Commission under the said section. This finding was made in view of the suggestion of the *applicants* that the discontinuance of the Twenty-third Street ferry might be regarded as a transfer of

service to Christopher Street rather than as an abandonment of the Twenty-third Street ferry. The Commission held, quoting syllabus No. 1 of *Atchison T. & S. F. Ry. Co. v. Railroad Comm. of California*, 283 U. S. 380 (1931) that its approval must be obtained, under the head of "rearrangement, extension and abandonment of tracks, and the use of the terminal facilities", even if "the proposed abandonment" were considered as merely "a relocation of terminal facilities in New York City".

(4) *Delaware, Lackawanna & W. R. R. Ferry Abandonment*, 290 I.C.C. 809 (1954), affirmed in *Board of Public Utilities Commissioners* v. *United States*, 132 F. Supp. 379 (1955), involved the above-mentioned Christopher Street ferry. The report of the Commission in this case was not printed. It appears from the decision of the three-judge District Court which affirmed the order of the Commission authorizing abandonment of the Christopher Street ferry that the applicant undertook to continue to operate the Barclay Street ferry around the clock. The District Court in the *Central* case, including one of the judges who sat in the *Lackawanna* case, states that the Commission's jurisdiction was not challenged in the latter case, was never before the Court and was not passed upon by the Court in that case.

(b) The first of these cases was decided twenty-one years after the adoption of the provision of the Act by which the Commission was given jurisdiction in matters of abandonment. The element of contemporaneousness of interpretation was therefore absent.

(c) Upon consideration of these four cases together it appears that the Commission exercised jurisdiction somewhat absent-mindedly in the first two cases and that its express finding of jurisdiction in the third case was based largely upon the consideration of instances in which the

discontinuance of a particular service over a line of railroad would result in the trackage involved no longer being required for use in interstate commerce. There was no examination as to whether "trackage", toward which the carrier has a maintenance responsibility, is fairly equivalent to a waterway toward which the carrier has no maintenance responsibility. The Commission did not in any of these four cases consider the significance of the fact that an extension of the line of railroad of a railroad which holds itself out as a common carrier of persons and goods must include equipment for the carriage of both persons and goods. The last-mentioned fact does not appear to have been brought sharply into focus in any of these four cases.

II. Appellant's Passenger and Freight Ferries a Single, Integral Portion of a Line of Railroad

Appellant's passenger ferry service and its freight service across the Hudson River between Jersey City, New Jersey and Chambers Street, New York City, New York, is an integral portion of a line of railroad between Chicago, Illinois and New York City. The routes traversed by units of the appellant's floating equipment in the transportation of persons and goods across the Hudson River constitute a single integral portion of the appellant's line of railroad from Jersey City, New Jersey to New York City, New York.

The passenger and freight ferry service between Jersey City, New Jersey and New York City, New York operated in connection with the railroad, is clearly within the definition of the term "railroad" as set forth in 49 U.S.C.A. Section 1 Paragraph (3)(a).* This has not been contested by

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* 49 U.S.C.A. Section 1(3)(a): "The term 'railroad' as used in this chapter shall include all bridges, *carfloats, lighters* and *ferries* used by or operated in connection with any railroad * * *." (Emphasis supplied)

any of the parties to this proceeding. See *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, which is in conformity with the appellees' position.

The District Court found that the appellant Erie furnishes passenger and freight transportation across New York Harbor to New York City, that there is nothing substantial in the record to justify the Commission holding that there is such a distinction between the passenger and freight ferry services after these services are water-bound between Jersey City and the railroad's terminus in New York City, as to turn them from a portion of a railroad line into two or more railroad lines or portions thereof. In support of this, the District Court pointed out that the passenger and freight ferries have the one General Superintendent; that they have one set of repair facilities; that freight trains of the line do not unload or load in the passenger terminal at Jersey City; that the freight depot is adjacent to the passenger station; that freight ferries are immediately north of the Erie-Jersey City passenger slips; and that on the Manhattan side, the freight carfloats and lighters do not land in the passenger ferry slips because of convenience to passengers and that special passenger boats and freight equipment are required. The District Court went on to say "But common-sense does not support the proposition that the mere dropping of the harbor passenger service from its passenger and freight-carrying railroad to New York City brings the Erie within Section 1 (18) of the Act and empowers the Commission to permit the discontinuance."

III. Relative Importance of the Instant Case

Both the appellants, Erie and Susquehanna, contend that the jurisdictional questions presented have substantial questions of federal jurisdiction which are of such importance that they transcend the rights of the litigants

and are of national importance to the railroad industry and administration of the Interstate Commerce Act.

The principle of law that the Interstate Commerce Commission has jurisdiction to authorize the discontinuances of passenger ferry service operated over an extension of a line of railroad separate and apart from the operation of freight service over the same line is well stated in the various decisions considered by the District Court. The only difference is that the prior decisions differ in the application of facts to the principle in that they deal with lines or portions of lines of railroad located upon the land, while the case before the Court deals with a portion of a line of railroad which is an extension over water. To distinguish the application of the principle of law involved merely because of the difference in the mode of transportation would be a failure to recognize the distinctions which are necessary as a practical matter in transportation over water.

The decision of this case depends upon the determination of the intent of Congress in the adoption of a statutory provision which has been interpreted by an administrative agency of the United States in a way to which the parties, including a state government, which has standing to do so under paragraph (20), section 1 of the act, *Colorado* v. *United States*, 271 U. S. 153 (1926), object in a Court of the United States. The executive and judicial departments of the Government of the United States have certainly no interest in having this statutory provision interpreted and applied in a manner at variance with the intent of the legislative department, which has sole responsibility under the Constitution for fixing the limits of the power that it has delegated to the Interstate Commerce Commission.

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities,

the power of those agencies is circumscribed by the authority granted." *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944)

The District Court has discharged its responsibility by deciding the issue of jurisdiction in accordance with the law as it stands. As the District Court states at page 103 of the *Central* decision, *supra*, Congress may decide to grant the Commission jurisdiction which it has not yet granted, but "until that time, the Commission, strictly a creature of its creating statute," is, in the District Court's opinion, without the power to permit the discontinuance of the partial service rendered by the appellant by passenger ferries across the Hudson River.

The financial solvency of the appellant and of other railroads is, of course, a matter of concern to this Court in any case in which it is shown to this Court that the intent of the Congress to provide procedures for the reduction of burdens on interstate commerce may have been thwarted by the decision of a three-judge District Court. It is submitted that it is clear from a reading of the decision of the District Court in this case that the statutory provision in question has been correctly interpreted and applied by that Court.

It is not the purpose of this motion and brief to argue the merits of the case with respect to Commission's failure to consider (1) Erie's financial condition as a whole, (2) changed operating conditions, (3) lack of adequate alternative service, and (4) whether or not the Commission's determination resulted in discrimination against certain of Erie's passengers in that they would be forced to ride the Hudson and Manhattan Railroad at a greater cost than to those who ride the ferries of the Delaware, Lackawanna and Western Railroad.

Any reliance by appellants upon alleged passenger deficits in showing the importance of the case is immaterial in view of the decisive issue as to whether the proposed change in ferry operations constituted a complete abandonment of a line of railroad or merely a curtailment of service.

IV. The District Court's Compliance With Proper Standards of Review

In rendering its decision, the District Court gave due weight and consideration to the findings and determinations of the Commission as has been demonstrated throughout this motion. Each and every factual situation was considered and weighed. All pertinent principles of law were applied. The District Court reached the only legal and logical conclusion possible after taking into consideration the nature of the transportation of passengers and freight upon land and water, which of necessity entails equipment suited for the purpose of passenger transportation or freight transportation.

With respect to the issue of jurisdiction, it must be borne in mind that an administrative body may not finally decide the limits of its statutory power. That is a judicial function. *Social Security Board* v. *Nierotko,* 327 U. S. 358 (1946).

The Commission's decisions are entitled to great deference because of its expertness in its field of regulation. The same applies to the Board. Yet neither agency, no matter how expert it may be, can make a determination as to its jurisdiction which is conclusive. *Social Security Board* v. *Nierotko, supra; East Texas Lines, Inc.* v. *Frozen Food Exp.,* 351 U. S. 49 (1956); *United States* v. *Idaho,* 298 U. S. 105 (1936); *Yonkers* v. *United States,* 320 U. S. 685 (1944); *Skidmore* v. *Swift & Co.,* 323 U. S. 134 (1944).

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 47

ERIE RAILROAD COMPANY,
Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

No. 55

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

Civil Action

On Appeal from the United States District Court for the District of New Jersey

MOTION TO DISMISS APPEALS BECAUSE OF MOOTNESS AND TO VACATE THE JUDGMENT APPEALED FROM

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Appellees.

Civil Action

On Appeal from the United States District Court for the District of New Jersey

MOTION TO DISMISS APPEALS BECAUSE OF MOOTNESS AND TO VACATE THE JUDGMENT APPEALED FROM

Petitioners* Erie and Susquehanna hereby respectfully move to dismiss the above entitled appeals in which they

* Throughout this petition we will refer to Erie Railroad Company as "Erie", New York, Susquehanna and Western Railroad Company as "Susquehanna", Interstate Commerce Commission as "Commission", State of New Jersey as "State", Board of Public Utility Commissioners of the State of New Jersey as "Board", United States District Court for the District of New Jersey as "District Court" and Trustee for New Jersey and New York Railroad Company as "Trustee".

are appellants and to vacate the judgment appealed from therein.

Erie, on February 10, 1956, filed an application with Commission for leave to abandon its passenger ferry service between Jersey City, New Jersey and New York City, New York pursuant to 49 U.S.C. Sec. 1(18). Subsequently applications were filed by Susquehanna and Trustee for abandonment of use under contract of said ferry line.

The matter was duly presented to and considered by the Commission and on June 26, 1957 Commission filed its report and issued an order and certificate authorizing abandonment of operation and use of said ferry from and after 30 days from the date of its order.

State and Board filed a complaint in the District Court, on August 9, 1957, to set aside Commission's order and certificate of public convenience and necessity. They also applied to the District Court and obtained an order for a preliminary injunction dated August 15, 1957. The case came on for hearing before three Judges sitting in the District Court and on December 10, 1957, that Court rendered its decision holding that the Commission had no jurisdiction under Section 1(18) of the Interstate Commerce Act (49 U.S.C. Sec. 1(18)) because a complete termination of Erie's passenger ferry operations would not constitute an abandonment of a line of railroad under Section 1(18) but would merely be a partial discontinuance of service over which Commission has no jurisdiction. *Board of Public Utility Commissioners of New Jersey* v. *United States, et al.*, 158 F. Supp. 98 (D. N. J. 1957).

A judgment was entered in the District Court on December 31, 1957 setting aside Commission's order and certificate of public convenience dated June 26, 1957.

Erie filed its notice of appeal in the District Court on February 18, 1958. Susquehanna filed its notice of appeal

in the District Court on February 28, 1958. This Court entered an order on June 16, 1958 noting probable jurisdiction in both cases. (357 U. S. 917, 2 L. Ed. 2d 1361, 78 S. C. 1358. #918 and #948)

Thereafter on August 12, 1958 the Transportation Act of 1958 became law (P.L. 85-625, 85th Cong. 72 Stat. 568, 49 U.S.C.).

On August 14, 1958 Erie and Susquehanna invoked the provisions of Section 13a(1) of said statute (49 U.S.C. 13a(1)) by filing notice with the Commission that the passenger ferry line operated between Erie passenger station at Jersey City, New Jersey and Chambers Street passenger station New York, New York (carrying passengers on the Northern Branch of the Erie Railroad, passengers of the New York, Susquehanna and Western Railroad and foot passengers) would be discontinued on September 14, 1958. Commission voted on August 25, 1958 not to conduct an investigation of said ferry abandonment. State and Board filed a complaint with Commission on August 25, 1958 which did not come to the attention of Commission before it voted at its meeting of August 25th. Thereafter, on September 2, 1958, Commission met again and after due deliberation, voted not to conduct a hearing or to otherwise interfere with the proposed Erie ferry discontinuance.

State and Board thereupon filed complaints in the District Court on September 4, 1958 wherein they sought judgment declaring that Section 13a(1) of the Transportation Act was unconstitutional and holding that the Commission in refusing to institute an investigation, acted arbitrarily and unreasonably. The District Court entered an order on September 12th temporarily enjoining Erie and Susquehanna from discontinuing said ferry service.

The case came on for hearing before three Judges sitting in the District Court on November 3, 1958. The Court (one

Judge dissenting) filed its opinion on November 25, 1958 holding Section 13a(1) of the Transportation Act constitutional and dismissing the complaint. A final judgment dismissing the complaint on the merits and dissolving the preliminary injunction was entered on December 4, 1958 with the provision that it "shall be effective as of 12:05 A.M. December 13, 1958."

On December 3, 1958, State and Board moved for a stay of the judgment pending appeal to the United States Supreme Court or in the alternative, for a stay pending application for a stay pending appeal to the United States Supreme Court to a Justice of the United States Supreme Court and the Court (one Judge dissenting) denied the motion for a stay but granted the motion for a stay of the judgment pending application for a stay to a Justice of the United States Supreme Court, said stay to expire automatically and without further action of the Court at 12:15 A.M. December 13, 1958.

State and Board did not apply to a Justice of the United States Supreme Court for a stay.

Erie discontinued the operation of its ferry between Jersey City and New York City on December 14, 1958. Susquehanna discontinued the use thereof on the same day.

State and Board had 60 days from the date of the entry of judgment on December 4, 1958 within which to file their appeal to this Court from the judgment of the District Court. Said 60 days expired on the 2nd day of February, 1959.

Neither State nor Board filed a notice of appeal from the judgment of the District Court dated December 4, 1958 and therefore their right to appeal from said judgment has expired.

By reason of the discontinuance of Erie Ferry service the issues presented for decision by the above entitled appeals have become moot.

Erie and Susquehanna have heretofore tendered to the Clerk of this Court, under the provisions of Rule 60 of the rules of this Court, any fees and costs that may be due in each of the above entitled cases.

WHEREFORE, the undersigned respectfully move for an order dismissing the above entitled appeals and vacating the judgment appealed from in accordance with the usual practice of this Court in such cases. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 95 L. Ed. 36, 71 S. C. 104 (1950).

Respectfully submitted,

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Dated: March 1959.